No. 89-688

Supreme Court, U.S.
FILED
OCT 27 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

GENERAL AMERICAN TRANSPORTATION CORPORATION, *et al*,.
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

136 pp

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QUESTIONS PRESENTED

In 1987, the Interstate Commerce Commission ("ICC" or "Commission") reversed its 40-year-old policy regarding the movement of empty rail cars for repair. The Commission concluded, for the first time, that rail carriers could charge separately for these moves. The Commission's conclusion undermines a central tenet of rail regulation—that rail carriers are responsible for providing suitable rail cars for transportation—and conflicts with decisions from the Seventh Circuit construing the Interstate Commerce Act. The Commission reached its decision after extensive comment by members of the industry, comments the Commission requested pursuant to the rule making procedures of the Administrative Procedure Act. Despite the well-established doctrine that agency rule making applies prospectively only, the Commission proceeded to apply this new rule retroactively to the petitioners in the case below. The questions presented are:

1. May the lower court require a showing of congressional awareness and express congressional approval before it recognizes the significance of Congress' failure to disturb the ICC's longstanding rule on empty repair moves, despite this Court's opinions stating that proof of congressional awareness or approval is not required?

2. Which interpretation of the Interstate Commerce Act is correct: the interpretation approved by the court below which upheld the ICC's new empty repair move policy, or the interpretation of the Seventh Circuit which held that separate charges for empty repair moves violated the Act?

3. May the lower court allow the Interstate Commerce Commission to alter the historic common carrier obligations of railroads to bear the cost of furnish-

ing the cars in which they transport property when Congress has not indicated an intent to alter these obligations?

4. May the lower court permit the ICC to apply its new rule on empty repair moves retroactively?

LIST OF PARTIES

Petitioners in consolidated case Nos. 87-1125, 87-1171 and 88-1284 include Railway Progress Institute Committee on Tank Cars, General American Transportation Corporation, General Electric Railcar Services Corporation, and Union Tank Car Company.

Intervenors in support of petitioners in these consolidated cases include the Chemical Manufacturers Association, LO Shippers Action Committee, MFB Industries, Inc., and U.S. Clay Producers Traffic Association, Inc.

Respondents in these consolidated cases include the Interstate Commerce Commission and the United States of America.

Intervenors in support of respondents in these consolidated cases include the Association of American Railroads, the Baltimore and Ohio Chicago Terminal Railroad Company, and Indiana Harbor Belt Railroad Company.

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Petitioners General American Transportation Corporation, General Electric Railcar Services Corporation, Railway Progress Institute Committee on Tank Cars, Union Tank Car Company, Chemical Manufacturers Association, MBF Industries, Inc., LO Shippers Action Committee, and U.S. Clay Producers Traffic Association, Inc. respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled proceedings on April 14, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 872 F.2d 1048 and is reprinted in the appendix hereto ("App.") at 1a. The opinion on rehearing is reported at 883 F.2d 1029 and is reprinted at App. 30a.

The decision of the Interstate Commerce Commission reversing its no-charge-for-empty-repair-moves policy is reported at 3 I.C.C.2d 599 and is reprinted at App. 37a. The decision of the Interstate Commerce Commission denying the petition for reopening and reconsideration is not reported and is reprinted at App. 69a.

JURISDICTION

The judgment of the Court of Appeals was entered on April 14, 1989, App. 1a, and a timely petition for rehearing and suggestion of rehearing en banc was denied on June 30, 1989. App. 30a. On September 13, 1989, the Chief Justice extended the time within which to petition for certiorari to and including October 28, 1989. App. 101a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISIONS

The following provisions of the Administrative Procedure Act are at issue:

> 5 U.S.C. § 551. Definitions.
>
> For the purposes of this subchapter—
>
> • • • •
>
> (4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;
>
> (5) "rule making" means agency process for formulating, amending, or repealing a rule;
>
> • • • •

(7) "adjudication" means agency process for the formulation of an order * * *.

5 U.S.C. § 553. Rule making

* * * *

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. * * *.

The following provisions of the Interstate Commerce Act, as amended, are at issue:

49 U.S.C. § 10102. Definitions.

In this subtitle—

* * * *

(26) "transportation" includes

(A) a locomotive, car, vehicle, motor vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, regardless of ownership or an agreement concerning use; and

(B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property.

49 U.S.C. § 10728. Separate rates for distinct rail services.

(a) A rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of Chapter 105 of this title may, on its own initiative or at the request of a shipper or receiver of property, establish separate rates for distinct rail services to—

(1) encourage competition;

(2) promote increased reinvestment by rail carriers; and

(3) encourage and make easier increased nonrailroad investment in the production of rail services.

(b) The Commission shall maintain expeditious procedures to permit separate rates for distinct rail services to—

(1) encourage those services to be priced in accordance with the cash-outlay incurred by the carrier and the demand for them; and

(2) enable shippers and receivers to evaluate transportation and related rates and alternatives.

49 U.S.C. § 10761. Transportation prohibited without tariff.

Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. * * *.

49 U.S.C. § 11122. Compensation and practice.

(a) The regulations of the Interstate Commerce Commission on car service shall encourage the purchase, acquisition, and efficient use of freight cars. The regulations may include—

(1) the compensation to be paid for the use of a locomotive, freight car, or other vehicle;

(2) the other terms of any arrangement for the use by a rail carrier of a locomotive, freight car, or other vehicle not owned by the rail carrier using the locomotive, freight car, or other vehicle, whether or not owned by another carrier, shipper, or third person; and

(3) sanctions for nonobservance.

(b) The rate of compensation to be paid for each type of freight car shall be determined by the expense of owning and maintaining that type of freight car, including a fair return on its cost giving consideration to current costs of capital, repairs, materials, parts, and labor. In determining the rate of compensation, the Commission shall consider the transportation use of each type of freight car, the national level of ownership of each type of freight car, and other factors that affect the adequacy of the national freight car supply.

STATEMENT OF THE CASE

The agency rule at issue in this case concerns whether railroads can charge the owners of private railcars for the costs of transporting their empty cars to and from repair facilities for maintenance. It is undisputed that

part of the obligation of railroads as common carriers is to provide railcars suitable for the transportation of a broad range of products. App. 4a. When the railroads are incapable of providing suitable equipment or refuse to invest in necessary equipment—such as tank cars—they are required to compensate shippers who do provide it. As the court below recognized, it is a given that the "[r]ailroads are not permitted to charge the railcar owners or car providers separately to return an empty car to the point of origination." *Id.* Instead, such empty moves have been regarded as a necessary part of the railroads' use of the cars to fulfill *their* common-carrier obligations, and thus the cost for them can only be recovered by the railroads in freight rates for commodities loaded and transported in such cars. *Id.*

Until the ICC action challenged here, empty movements of the private cars to and from repair facilities for ordinary maintenance were historically treated in the same manner as other empty movements. *See Union Tank Car Co.*, 268 I.C.C. 338 (1947). This rule was challenged in a 1977 proceeding involving many of the same parties involved in the present case. The ICC turned away the challenge, reiterating its adherence to the rule that railroads could not charge separately for empty car repair moves. *General Am. Transp. Corp.* v. *Indiana Harbor Belt R.R. Co.*, 357 I.C.C. 102 (1977). In that proceeding, the Commission confirmed that once the private cars were put into service they were "instrumentalities of transportation" whose movement for repairs was the collective responsibility of the carriers, rather than a "distinct rail service" provided the individual car owners for which those owners could be separately charged. *Id.* The ICC ruled that because "[t]he need for such repairs of privately owned cars will usually arise as a result of use by many different carriers over a considerable period of time. * * * [T]he costs of repair movements of privately owned cars must be treated as a common cost

which must be shared by all carriers which derive revenue from the national private-car fleet." *Id.* at 127.

The ICC noted that the costs of empty car repair moves could be recouped through the charges for carrying freight in the cars. While this might mean that some carriers would end up with more than their proportional share of the costs of empty car repair moves, the Commission recognized that railroads and private tank car owners had agreed to an "equalization rule" discouraging excessive empty mileage. The Seventh Circuit affirmed the ICC ruling as the "correct conclusion," holding that the imposition of separate charges for empty car repair movements would violate the Interstate Commerce Act. *Indiana Harbor Belt R.R. Co.* v. *General Am. Transp. Corp.*, 577 F.2d 394, 400-401 (7th Cir. 1978).

Nonetheless, in 1983, the same railroad involved in the 1977 proceeding (along with another) filed proposed tariffs seeking to impose separate charges for empty car repair moves. Petitioners initiated an adjudicatory proceeding before the ICC to block the tariffs. Mid-way through the adjudication process the ICC published a notice in the Federal Register under the authority of the "rule making" provision of the Administrative Procedure Act, 5 U.S.C. § 553, "advising the public and the parties * * * that we may modify or reverse our prior decisions," and soliciting comments from interested persons. 49 Fed. Reg. 39,740 (Oct. 10, 1984). It followed up with another notice seeking additional comments, again citing the authority of the rule making provision of the APA. 50 Fed. Reg. 10,867-68 (March 18, 1985). Three years later the Commission reversed its 40-year-old policy, announcing that railroads could charge private car owners for empty repair moves.

Relying on the public comments it had received as a result of its invocation of the APA rule making proceedings, the ICC decided that its 40 year-old rule was an

inefficient and inequitable means of compensating carriers for empty car repair moves. App. 44a-48a. The Commission reasoned that the system of recouping the costs through freight charges resulted in some carriers bearing more than their fair share of repair move costs. It viewed such a result as contrary to "Congressional direction" in the 4R Act [1] and the Staggers Act [2] requiring "the Commission to encourage efficient pricing and provide all carriers with a realistic opportunity to earn adequate revenues." App. 56a. Finally, the ICC applied the new rule retroactively to the charges proposed in the 1983 tariffs, rejecting petitioners' contention that such an about-face—announced as a result of rule making procedures—could only be applied prospectively. App. 65a-66a. Vice Chairman Lamboley dissented. App. 68a.

On April 14, 1989, the Court of Appeals upheld the Commission's action. The court below held that the agency's prior policy had not been legislatively ratified, despite Congress' failure to overturn it when revisiting the pertinent statute in 1978 and 1980. The Court then held that the agency's "reinterpretation" was reasonable, not because new statutory provisions compelled the new policy, App. 15a, and not because of any specific congressional intent on the issue, App. 14a, but rather because "the Commission permissibly discerned an *emerging* congressional purpose to permit carriers to price their services efficiently in accordance with both the costs properly chargeable to such services and market forces." *Id.* (emphasis added).

Finally, the lower court upheld retroactive application of this new regulatory regime. It held that the adjudi-

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[1] Railroad Revitalization and Regulatory Reform Act, Pub. L. No. 94-210, 90 Stat. 31 (1976). The 4R Act was in effect in 1977 when the Commission reaffirmed its rule banning separate charges for empty car repair moves in the first *Indiana Harbor* proceeding. *See* 357 I.C.C. at 129 n.30, 131 n.31.

[2] Pub. L. No. 96-448, 94 Stat. 1895 (1980).

catory proceeding had not been transformed into a rule making requiring prospective application only, despite the ICC's own express invocation of the APA rule making provisions. According to the Court of Appeals, the agency's formal solicitation of and reliance on public comments under the APA was no different than judicial consideration of *amicus* briefs. App. 25a.

Petitioners sought rehearing, which was denied on June 30, 1989. App. 31a. Judge Silberman—the author of the panel opinion—issued an additional opinion concurring in the denial of rehearing. He recognized, quoting from a recent Supreme Court concurring opinion by Justice Scalia, that "arguments no doubt can be advanced in support of limiting agencies' policymaking use of the adjudicatory form to circumstances where 'legal consequences hinge upon the interpretation of statutory requirements, and where no pre-existing interpretive rule construing those requirements is in effect,' [*Bowen* v.] *Georgetown Univ. Hosp.*, 109 S. Ct. at 480 (Scalia, J., concurring)," but he concluded that "the law of this circuit is emphatically to the contrary." App. 34a.

REASONS FOR GRANTING THE WRIT

The court below erred in upholding the ICC's reversal of its 40-year-old rule prohibiting railroads from imposing separate charges on car owners for empty repair moves. The decision below merits review by this Court for four separate reasons. First, the ruling below conflicts with holdings of the Seventh Circuit that the Interstate Commerce Act forbids such charges. *See Indiana Harbor Belt R.R. Co.* v. *General Am. Transp. Corp.*, *supra*; *Atchison, T. & S. F. Ry. Co.* v. *Union Tank Car Co.*, 611 F.2d 1184, 1188 (7th Cir. 1979); *Evans Prods. Co.* v. *ICC*, 729 F.2d 1107, 1109 (7th Cir. 1984). Resolution of this conflict is of critical importance to the rail and private railcar industries.

Second, the approach of the court below is contrary to this Court's oft-repeated admonition that "when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.' " *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 846 (1986), *quoting NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 274-275 (1974). The court below rejected petitioners' reliance on this doctrine, insisting upon express evidence that Congress was aware of and had approved the ICC's longstanding rule. The Circuits are in considerable disarray with respect to the standards for applying this doctrine, and this Court should grant the writ to resolve the confusion.

Third, the holding below undermines a central tenet of rail regulation—that railroads must bear the costs of providing suitable railcars as part of their common carrier obligation. Such a marked departure from a basic principle historically governing regulation of an important national industry should not be permitted to stand without review by this Court.

Finally, this Court should grant review to resolve the conflict created by the lower court's decision to permit retroactive application of the ICC's new rule. The decision below blurred the " 'dichotomy between rule making and adjudication' "—the dichotomy upon which " 'the entire [Administrative Procedure] Act is based.' " [3]—and permitted retroactive application even though the ICC invoked and relied upon the APA's prospective rule making provisions. Judge Silberman, in his opinion on rehearing, expressly recognized that the law of his Circuit was "emphatically * * * contrary" to Justice Scalia's

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[3] *Bowen* v. *Georgetown Univ. Hosp.*, 109 S. Ct. 468, 477 (1988) (Scalia, J., concurring), *quoting* Attorney General's Manual on the Administrative Procedure Act (1947) at 13-14.

reasoning last Term in his concurring opinion in *Bowen*. App. 34a. Judge Silberman also cited conflicting authority from the Ninth Circuit. *Id.* This Court should grant the writ to resolve the conflict and determine whether the arguments raised by Justice Scalia in his concurring opinion or the "contrary" view of the court below should prevail.

I. The Court Below Erred In Dismissing The Significance Of Congress' Failure To Disturb The ICC's Longstanding Rule

When the Commission ruled more than 40 years ago that railroads could not impose separate charges for empty repair moves, its decision was based on a reading of the Interstate Commerce Act. The Commission concluded that during such movements the cars were "instrument[alities] of transportation" and not "property subject to transportation charges within the meaning of section 6(7) of the act." *Union Tank Car Co.*, 268 I.C.C. 338, 342 (1947). When the ICC reaffirmed this rule 30 years later, its decision was once again based on a construction of the statute. In addition to quoting from its *Union Tank Car* analysis, the Commission further ruled that empty repair moves were not "distinct rail services" under 49 U.S.C. § 10728 for which separate rates could be charged. *General Am. Transp. Corp.* v. *Indiana Harbor Belt R.R. Co.*, 357 I.C.C. 102, 129 (1977) On appeal, the Seventh Circuit agreed that the railroads' effort to assess such charges in that case was a violation of the Interstate Commerce Act. *Indiana Harbor Belt R.R. Co.* v. *General Amer. Transp. Corp.*, 577 F.2d at 400.

Congress extensively amended the Interstate Commerce Act in 1980 with passage of the Staggers Act.[4] Yet Con-

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[4] Pub. L. No. 96-448, 94 Stat. 1895 (1980). *See Coal Exporters Ass'n of the United States, Inc.* v. *United States*, 745 F.2d 76, 80 (D.C. Cir. 1984) ("[t]he Staggers Rail Act of 1980 was a complex and comprehensive amendment to the [Interstate Commerce Act]").

gress did not make any pertinent changes to the provisions on which the ICC had relied in concluding in 1947 and again in 1977 that empty repair moves were not subject to separate charges, nor to the provisions on which the Seventh Circuit had relied in upholding the ICC's interpretation of the Act as the "correct conclusion." 577 F.2d at 401.

Again this background of congressional and judicial acceptance of the ICC's established rule, a reversal of the rule could be justified only by persuasive evidence that *Congress* had changed its mind. The ICC pointed to no such evidence, and the court below acknowledged that the agency cited no new legislative provisions "reflective of Congress' specific intent on the question." App. 14a. As the court stated, the provisions on which the ICC relied "do not *compel* the approach adopted by the Commission in *Indiana Harbor II*. None of the provisions is specifically directed to relations between carriers and car providers." App. 15a (emphasis in original). The most that the Court of Appeals could say was that the agency "permissibly discerned an emerging congressional purpose" supporting its action. App. 14a.

Such an inchoate basis may be sufficient to support an agency interpretation with respect to an issue of first impression, or perhaps even a change in an agency interpretation promulgated through rulemaking procedures and accordingly given prospective effect only. When Congress has revisited the pertinent statute and not altered a significant, 40-year rule promulgated under the statute, however, and when that rule is based on a core principle of common carrier obligation that Congress has not disturbed, the agency should not be permitted to change course on such an amorphous basis.

The court below rejected petitioners' argument that this history demonstrated congresional acquiescence in and approval of the longstanding administrative rule, holding that "the legislative reenactment doctrine re-

quires a showing of both congressional awareness and 'express congressional approval of an administrative interpretation if it is to be viewed as statutorily mandated.' " App. 10a, *quoting AFL-CIO* v. *Brock*, 835 F.2d 912, 915 (D.C. Cir. 1987).

This Court's decisions and those of other Circuits, in contrast, are based on the rule that "Congress is *presumed* to be aware" of such a longstanding administrative interpretation, *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978) (emphasis added), and that such interpretations "are *deemed* to have been approved by Congress" when, as here, the pertinent statute is reenacted without change. *Ward* v. *Commissioner*, 784 F.2d 1424, 1430 (9th Cir. 1986) (emphasis added).

The court below itself acknowledged the conflict. After reiterating its rule that the doctrine "requires" express evidence of congressional awareness and approval, the court recognized in footnote that "[t]he Supreme Court has said, *even absent proof of congressional awareness or approval*, that 'when Congress revisited a statute giving rise to a longstanding administrative interpretation without pertinent change, the "congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." ' " [5]

This Court has not insisted upon express evidence that Congress was actually aware of the administrative interpretation held to have been ratified by reenactment. "It is always appropriate to *assume* that our elected representatives, like other citizens, know the law," *Cannon* v. *University of Chicago*, 441 U.S. 677, 696-697 (1979) (emphasis added), and this Court has stated that " 'Congress is presumed to be aware of an administrative or

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[5] App. 10a, n.10, *quoting Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. at 846, *quoting NLRB* v. *Bell Aerospace Co.*, 416 U.S. at 274-275 (emphasis added).

judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.'" *Merrill Lynch, Pierce, Fenner & Smith* v. *Curan*, 456 U.S. 353, 382 n.66 (1982), *quoting Lorillard* v. *Pons*, 434 U.S. at 580-581. This presumption is particularly appropriate when, as here, the administrative interpretation had been in effect for several decades prior to legislative reenactment, had been reaffirmed by the agency on the eve of legislative reenactment, and that reaffirmation had been upheld as statutorily compelled by a Federal Court of Appeals.

Turning to the other prerequisite imposed by the D.C. Circuit, this Court has clearly held that express congressional approval of a longstanding administrative or judicial interpretation is *not* required before applying the legislative reenactment doctrine. On the contrary, "congressional acquiescence may sometimes be found from nothing more than silence in the face of an administrative policy." *Haig* v. *Agee*, 453 U.S. 280, 300 (1981).[6]

The Circuits are in considerable disarray on the question. Some Courts of Appeals appear to agree with the approach of the court below, insisting upon express evidence of legislative awareness and approval. *See, e.g., Horner* v. *Jeffrey*, 823 F.2d 1521, 1531 (Fed. Cir. 1987) ("Congress cannot be held to have approved or even been aware of the [interpretation] when it reenacted the provisions"); *American Trucking Ass'ns, Inc.* v. *ICC*, 722 F.2d 1243, 1249 n.3 (5th Cir. 1984); *Mayburg* v. *Secretary of HHS*, 740 F.2d 100, 104-105 (1st Cir. 1984).

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[6] *See Young* v. *Community Nutrition Inst.*, 476 U.S. 974 (1986); *Bob Jones Univ.* v. *United States*, 461 U.S. 574 (1983); *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512 (1982); *United States* v. *Rutherford*, 442 U.S. 544 (1979); *Zemel* v. *Rusk*, 381 U.S. 1, 11 (1965); *Udall* v. *Tallman*, 380 U.S. 1, 16-18 (1965); *Norwegian Nitrogen Co.* v. *United States*, 288 U.S. 294, 313 (1933); *Costanzo* v. *Tillinghast*, 287 U.S. 341, 345 (1932).

Other Circuits take an opposite approach, applying this Court's precedents establishing that Congress is *presumed* to be aware of longstanding interpretations and *deemed* to approve them when it reenacts the underlying statute without change. *See, e.g., Sierra Club* v. *Hodel*, 848 F.2d 1068, 1080 (10th Cir. 1988) ("[e]specially when an agency has followed a notorious, consistent, and long-standing interpretation, it may be presumed that Congress' silence denotes acquiescence"); *FMC Wyoming Corp.* v. *Hodel*, 816 F.2d 496, 501 n.11 (10th Cir. 1987), *cert. denied*, 108 S. Ct. 772 (1988) ("Congress' failure to alter this interpretation while amending the statute in other respects indicates that legislative intent has been correctly discerned"); *Demarest* v. *Manspeaker*, 1989 U.S. App. LEXIS 13193 (10th Cir. Sept. 5, 1989) ("[h]ad Congress meant to change the existing judicial and administrative interpretation of [the statute], it surely could have done so in more express terms"); *In re Dept. of Energy Stripper Well Exemption Litig.*, 690 F.2d 1375, 1388 (Temp. Emer. Ct. App. 1982), *cert. denied*, 459 U.S. 1127 (1983) (congressional failure to modify viewed as "a significant and probative indication" of approval; reenactment without change equated to Congress speaking "loudly, clearly and unequivocally" in favor of administrative interpretation).

This confusion is also evidenced in intra-circuit conflicts. *Compare, e.g., Fmali Herb, Inc.* v. *Heckler*, 715 F.2d 1385, 1387-88 n.1 (9th Cir. 1983) ("[t]he regulation has never been the focus of active debate of judicial decisions, so deference based upon congressional acquiescence is inappropriate") *with Osborn* v. *American Ass'n of Retired Persons*, 660 F.2d 740, 746 (9th Cir. 1981) ("[t]he agency's interpretation of the statute is entitled to still more deference when Congress subsequently reenacts the statute without significant change, for it is then presumed that the agency interpretation has been implementing the statutory objectives to Congress' satisfaction").

A proper understanding of the content of the legislative reenactment doctrine is of central importance throughout the area of administrative law. The articulation of the court below—requiring express evidence of awareness and approval—conflicts with this Court's explanation of the doctrine and the approach of several Circuits. This Court should grant the writ to clarify the scope of the doctrine and provide guidelines for its uniform application in the Circuits.

II. The Decision Below Conflicts With Decisions From The Seventh Circuit

The decision below conflicts with decisions from the Seventh Circuit holding that empty repair movements of private railcars "are not distinct rail services for which a direct charge may be made." *Evans Prods. Co.* v. *ICC*, 729 F.2d at 1109. *Accord Indiana Harbor Belt R.R. Co.* v. *General Am. Transp. Corp.*, *supra*; *Atchison, T. & S. F. Ry. Co.* v. *Union Tank Car Co.*, *supra*. The court below acknowledged that "the Seventh Circuit twice approved the Commission's former position that empty-repair moves were not distinct rail services," but dismissed the significance of these rulings on the ground that they did not "rest[] on a construction of the Interstate Commerce Act" and did not preclude the ICC from changing course. App. 9a. The court's reasoning is unfounded and does not mitigate the conflict between the Circuits.

A reading of the Seventh Circuit's opinion in *Indiana Harbor Belt I* rather clearly discloses that its decision upholding the ICC's prior rule *was* based on a construction of the Interstate Commerce Act. The Seventh Circuit expressly and unambiguously held that the railroad's imposition of charges on car owners for empty car repair moves "is an obvious and direct violation of Section 1(5) of the Interstate Commerce Act," "violates Section 1(6)," and "also violates Section 1(11) of the Act." 577 F.2d at 400. After noting that "[c]ar service is defined in Sec-

tion 1(10) to include the 'use, control, supply, movement, distribution, exchange, interchange and return of locomotives, cars and other vehicles used in the transportation of property,'" the Seventh Circuit concluded that "[c]learly, the imposition of a switching charge on a movement of cars which is a part of the transportation service comprehended by the charge on loaded movements is an unreasonable and unlawful car service practice." *Id.* The assertion of the court below that the Seventh Circuit did not construe the Interstate Commerce Act is amply refuted by the language of the Seventh Circuit's opinion. The Seventh Circuit did not hold simply that the ICC's prior rule was a permissible construction of the statute; it was the "correct conclusion" based on the statute itself. 577 F.2d at 401.

The Seventh Circuit's later decisions relying upon *Indiana Harbor I* cited the statutory terms of art in explaining the holding of *Indiana Harbor I*. In *Atchison, T. & S. F. Ry. Co.* v. *Union Tank Car Co.*, 611 F.2d at 1188, the court noted that private cars, "albeit 'property' in the ordinary sense of that term, are 'instrumentalities of transportation' and therefore not subject to ordinary freight charges." In *Evans Products*, 729 F.2d at 1109, the court stated that "[r]ail cars that have entered the national fleet and are in use shipping goods generally are considered instrumentalities of transportation for which no freight charges for their movement may be imposed" and that "[r]epair switches are not distinct rail services for which a direct charge may be made." "Instrumentality * * * related to the movement of * * * property" and "distinct rail services" are of course statutory phrases, *see* 49 U.S.C. §§ 10102(26), 10728, and the Seventh Circuit decisions—contrary to the view of the court below—construed the meaning of those statutory phrases.

The decision below thus conflicts with the Seventh Circuit decisions on whether the Interstate Commerce Act permits railroads to impose separate charges for empty

private car repair moves. This Court should grant the writ to resolve this conflict.

III. The ICC's New Rule Undermines A Central Tenet Of Rail Regulation That Congress Has Not Rejected

The court below upheld the Commission's about-face because of the policies it discerned in the Staggers Act of promoting an efficient railroad rate structure and preventing cross-subsidization. *See* App. 14a-15a. The court noted the ICC's concern that some railroads bore more than their fair share of empty repair move costs, because they had a large number of empty repair moves—for which they could not charge separately—relative to freight movements in the cars, through which they could attempt to recover the empty repair move costs. But the ICC's new rule does not promote the policies of the Staggers Act by correcting any possible misallocation of empty repair move costs *among* railroads. Rather, it arbitrarily and capriciously shifts the costs of such moves away from *all* railroads and onto the car providers.

Nothing in the Staggers Act, however, suggested altering the historic common carrier obligations of the railroads, including "the fundamental common carrier obligations to furnish suitable equipment for the transportation of all traffic handled by [the railroad] and to maintain such equipment in proper condition for transportation use." *Indiana Harbor Belt R.R. Co.* v. *General Am. Transp. Corp.*, 577 F.2d at 399. As the Seventh Circuit noted in its *Evans Products* decision—issued several years after passage of the Staggers Act—"[r]ailroad common carriers are required to offer shippers complete transportation services; as part of these services, carriers must provide shippers with the cars in which freight is moved." 729 F.2d at 1108. *See also Atchison, T. & S. F. Ry. Co.* v. *Union Tank Car Co.*, 611 F.2d at 1188 ("the duty to furnish cars is the railroads', not the shippers'. Thus when railroads use cars other than their

own to transport property or passengers, the cars are being used for the revenue purposes of the railroads and not for the private benefit of the owner").

The Commission's new rule is arbitrary and capricious because it addresses purported concerns about cross-subsidization and misallocation of empty repair move costs among *railroads* by shifting those costs away from the railroads altogether and onto private car *providers*. Under historic common carrier doctrine, it is the railroads—and not the car owners—who must bear the full cost of owning and maintaining the cars. *See* 49 U.S.C. § 11121(a)(1).

Both the ICC and the Court of Appeals professed continued adherence to the principle of carrier responsibility for the costs of owning railroad cars. App. 4a, 38a. The new rule, however, permits carriers to evade that historic responsibility. Indeed, the court below recognized that the Commission

> may have been a bit facile in its initial opinion in suggesting that its decision involved only an accounting change that would have little or no impact in determining who—as between carriers and car providers—would bear the burden of the costs involved. In its order on rehearing, however, the Commission conceded that car providers may be unable to recoup completely the costs of empty-repair moves from railroads * * *. And the Commission reiterated, in any event, that the statute simply does not guarantee providers full cost recovery. [App. 17a.]

Under the new rule, railroads can charge providers for empty repair moves—concededly a component of the common carrier obligation—and the car providers are to attempt to recoup those costs through adjustments in allowances the providers receive from the carriers for furnishing the cars. This new regime will not result in "full cost recovery" by the car providers for several reasons:

- Carriers in recent years have been unwilling to update private car allowances to reflect increased costs of ownership.
- Some carriers have imposed arbitrary "caps" on mileage allowances to car providers.
- Many car providers furnish cars under long-term contracts, with rates set under the prior regulatory regime that did not allow empty repair move charges.

In the absence of full cost recovery, however, the car providers—not the carriers—will bear at least part of the cost of the common carrier obligation to furnish suitable railcars. Nothing in the Staggers Act suggested rationalizing rail rates by shifting common carrier obligations from the common carriers, individually or collectively. If Congress had intended the Act to accomplish such a significant change, it is reasonable to expect that it would have mentioned it in the text of the statute or the voluminous legislative history. It did not do so. This failure is particularly telling given the longstanding administrative adherence to and judicial approval of the established rule.

Neither the agency nor the court below could point to any specific congressional intent supporting reversal of the empty repair move rule. The ICC and D.C. Circuit instead relied upon a patchwork of hints in the Staggers Act pointing to "an emerging congressional purpose." App. 14a. As this Court noted recently, however, the " 'deference owed to an expert tribunal cannot be allowed to slip into judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress.' " *Bureau of Alcohol, Tobacco & Firearms* v. *FLRA*, 464 U.S. 89, 97 (1983), *quoting American Ship Building Co.* v. *NLRB*, 380 U.S. 300, 318 (1965).

There is no evidence in the Staggers Act that Congress made the policy decision to alter the historic common carrier obligations of railroads to bear the cost of furnishing the cars in which they transport property. In fact, Congress left undisturbed the longstanding rule implementing this obligation. Against this background, it was arbitrary and capricious for the ICC to change the rule and embrace a new policy. The question merits review by this Court because the court below has misinterpreted an important federal statute and erroneously ascribed to Congress an intent to undermine a basic principle of common carrier obligation.

IV. The Court Below Erred In Permitting The Agency To Apply Its Reversal Of Policy Retroactively

What is particularly troubling is the decision of the court below that the ICC could apply its new rule retroactively to petitioners, who had relied on the old established rule in shaping their business relationships with the intervenor railroads. This decision conflicts with decisions from other Circuits on the retroactive application of new agency interpretations, and with the recent decision of this Court in *Bowen* v. *Georgetown University Hospital*, 109 S. Ct. 468 (1988). The opinion for the Court and Justice Scalia's concurring opinion in *Bowen*—issued after briefing was complete in the present case—are highly pertinent to the retroactivity issue, but were not cited and apparently not considered by the panel in its initial decision. In his supplemental opinion on rehearing, Judge Silberman—author of the panel opinion—expressly noted that the views expressed in Justice Scalia's opinion were contrary to the law applied by the Court of Appeals for the District of Columbia Circuit. App. 34a.

The error of the court below derived from the hermaphroditic nature of these proceedings. It is well established that agency adjudication applies retroactively,

and agency rule making applies prospectively only. This makes sense because, as Justice Scalia explained in his concurring opinion in *Bowen*, "[a]djudication *deals* with what the law was; rulemaking deals with what the law will be." 109 S. Ct. at 478 (emphasis in original). In this case, the ICC converted what began as an adjudication to *apply* its pre-existing rule into a rule making proceeding to *change* that rule. The Commission nonetheless reverted to viewing the proceeding as an adjudication in applying its new rule retroactively to petitioners, even though the new rule admittedly did not reflect what the law had been.

The Commission's decision to overturn its established policy on the permissibility of separate charges for empty car repair moves was agency rule making. The results of such rule making may be applied prospectively only.[7] The ICC itself stayed the normal course of what began as an adjudicatory proceeding and issued a notice in the Federal Register soliciting public comments on the desirability of changing its established policy. When it did so, the agency expressly invoked and relied upon Section 553 of the APA, entitled "Rule making." 5 U.S.C. § 553 (1982). Over petitioners' objections, it transformed the proceeding from one "designed to adjudicate disputed facts in *particular* cases"[8] into a broader undertaking to consider "what the law will be." *Bowen*, 109 S. Ct. at 478 (Scalia, J., concurring).

The transformation of the proceeding was not simply a matter of form but of substance as well. The ICC's requests for comments under the APA rule making provisions generated responses concerning industry practices

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[7] *See Bowen*, 109 S. Ct. at 471; *SEC* v. *Chenery Corp.*, 332 U.S. 194, 202 (1947).

[8] *Association of Nat'l Advertisers* v. *FCC*, 627 F.2d 1151, 1165 (D.C. Cir. 1979) (emphasis added), *cert. denied*, 447 U.S. 921 (1980).

and policies from over 20 car providers, shippers, railroads, trade associations, and other organizations in addition to the parties initially before the agency. *See* App. 43a, n.10-12. The agency expressly relied upon legislative facts it discerned on the basis of these filings in concluding that there was an industry-wide misallocation of empty repair move costs among railroads, and in deciding to overturn its established policy. App. 44a-48a. Such solicitation, consideration, and reliance on legislative facts submitted by representatives of various broad segments of the industry is emblematic of agency rulemaking.[9]

The lower court's sole response to this problem was to note that courts often consider *amicus* briefs in deciding cases. App. 25a. The analogy is misplaced and misleading. Courts are empowered to act *only* in an adjudicatory capacity, and any consideration of *amicus* briefs does not transform the nature of the court's task. Indeed, in judicial proceedings *amicus* briefs cannot be filed as a matter of right, *see, e.g.*, Fed. R. App. P. 29; S. Ct. Rule 36, cannot expand the issues or arguments presented by the parties before the court, *see, e.g., UPS* v. *Mitchell*, 451 U.S. 56, 60 n.2 (1981), and need not be considered at all by the court. Agencies, in contrast, can proceed *either* through adjudication *or* rule making. When, as here, an agency invokes the rule making procedures of Section 553 of the APA, any interested member of the public acquires the *right* to submit comments, which *can* expand the contentions and issues raised by the parties, and any relevant comments that are submitted *must* be considered by the agency. *See* 5 U.S.C. § 553(c) (1982).

In upholding the ICC's approach, the court below blurred the "dichotomy between rule making and adjudi-

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[9] *See, e.g., Independent Bankers Ass'n of Ga.* v. *Board of Governors of the Fed. Reserve Sys.*, 516 F.2d 1206, 1215 (D.C. Cir. 1975); *Wisconsin Gas Co.* v. *FERC*, 770 F.2d 1144, 1166 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1114 (1986).

cation' "—the dichotomy upon which " 'the entire [Administrative Procedure] Act is based' "—and left petitioners with the worst of both worlds.[10] The Court of Appeals upheld the agency's change in position by treating the case as rule making, in which the agency was striving to "discern[] an emerging congressional purpose." App. 14a. Such an effort would not pass muster in an adjudication, concerned with "what the law was." *Bowen*, 109 S. Ct. at 478 (Scalia, J., concurring). Once it upheld the new rule, however, the Court shifted gears and treated the case as an adjudication, thereby upholding retroactive application of the new agency interpretation. This whipsawing of petitioners between rule making and adjudication raises fundamental issues of recurring significance to administrative law, issues which this Court should grant certiorari to consider.

As Judge Silberman intimated on rehearing, the decision below conflicts not only with Justice Scalia's opinion in *Bowen*, but also with the Ninth Circuit's decision in *Ford Motor Co.* v. *FTC*, 673 F.2d 1008 (9th Cir. 1981), *cert. denied*, 459 U.S. 999 (1982). *See* App. 34a. In *Ford Motor* the Ninth Circuit ruled that the FTC could not proceed through adjudication to change existing law in a manner that had widespread applicability, but must use rule making. *See also Patel* v. *INS*, 638 F.2d 1199 (9th Cir. 1980). The court specifically noted that a pending rule making addressed the same problem as the FTC's adjudicator proceeding. 673 F.2d at 1010. The pertinent facts are indistinguishable here: there is no question that the ICC's decision changed the law, or that the decision will apply generally throughout the industry. And here the ICC invoked the APA rule making provi-

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[10] *Bowen*, 109 S. Ct. at 477 (Scalia, J., concurring) *quoting* Attorney General's Manual on the Administrative Procedure Act (1947) at 13-14. The Supreme Court has "repeatedly given great weight" to the Manual in construing the APA. *See Bowen*, 109 S. Ct. at 476 (Scalia, J., concurring) (citing cases).

sions not in another pending proceeding but *in this very proceeding*. Under the Ninth Circuit's *Ford Motor* ruling, the ICC's change in the law could only be effected through rule making, and thus could not be retroactively applied. This Court should grant the writ to resolve this basic conflict on an important and recurring issue of administrative law.

The approach of the court below is also in sharp contrast to that of the Fifth Circuit in *Nueces County Navigation Dist. No. 1* v. *ICC*, 674 F.2d 1055 (5th Cir.), *cert. denied*, 459 U.S. 1035 (1982). In that case the Court of Appeals upheld the ICC's conversion of an adjudicatory proceeding into a rule making, but only after stressing that "no retroactive liability was imposed" as a result of the hybrid proceeding and that "the only effect of the adoption of the new standard * * * is to permit unequalized rates *in the future*. * * *." *Id.* at 1066 (emphasis added). That plainly is not the case here; the retroactive application of the ICC's new rule yields charges in excess of $3 million in this case.[11]

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[11] *See* Ct. App. Br. for Pets. at 14 n.16.

CONCLUSION

For the foregoing reasons, the Court should grant the writ and reverse the decision below.

Respectfully submitted,

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APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued January 9, 1989 Decided April 14, 1989

No. 87-1125

GENERAL AMERICAN TRANSPORTATION CORPORATION, *et al.*,
Petitioners

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,
Respondents

LO SHIPPERS ACTION COMMITTEE,
BALTIMORE AND OHIO CHICAGO TERMINAL RAILROAD CO.,
U.S. CLAY PRODUCERS TRAFFIC ASSOCIATION, INC.,
ASSOCIATION OF AMERICAN RAILROADS,
CHEMICAL MANUFACTURERS ASSOCIATION,
Intervenors

No. 87-1171

RAILWAY PROGRESS INSTITUTE COMMITTEE ON TANK CARS,
Petitioners

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,
Respondents

ASSOCIATION OF AMERICAN RAILROADS,
BALTIMORE AND OHIO CHICAGO TERMINAL
RAILROAD CO., *et al.*,
CHEMICAL MANUFACTURERS ASSOCIATION,
MBF INDUSTRIES, INC.,
Intervenors

No. 88-1284

RAILWAY PROGRESS INSTITUTE COMMITTEE ON TANK CARS, *et al.*,
Petitioners

v.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA,
Respondents

ASSOCIATION OF AMERICAN RAILROADS, BALTIMORE AND OHIO CHICAGO TERMINAL RAILROAD CO., *et al.*,
Intervenors

Petitions for Review of Orders of the Interstate Commerce Commission

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Patrick M. Raher, with whom *Elizabeth B. Heffernan*, *Thomas F. McFarland, Jr.*, *David F. Zoll*, *John L. Oberdorfer*, *Scott N. Stone*, *Peter A. Greene*, *R. Hale Foote* and *Henry M. Wick, Jr.*, were on the joint brief, for petitioners and intervenors Chemical Manufacturers Association, MBF Industries, Inc., and U.S. Clay Producers Traffic Association, Inc. in 87-1125, 87-1171 and 88-1284.

Peter F. Rousselot also entered an appearance for petitioners in 87-1171.

Dennis J. Starks, Attorney, Interstate Commerce Commission, with whom *Henri F. Rush*, Deputy General Counsel, *Robert S. Burk*, General Counsel, *John J. Powers, III* and *John P. Fonte*, Attorneys, Department of Justice, were on the brief, for respondents in 87-1125, 87-1171 and 88-1284.

Stephen C. Herman, with whom *Harold E. Spencer* was on the brief, for intervenor LO Shippers Action Committee in 87-1125, 87-1171 and 88-1284.

Robert M. Jenkins, III, with whom *Paul A. Cunningham, Marc D. Machlin, W. Susanne Addy, Joseph D. Anthofer, James L. Howe, III, John B. Norton, William R. Power, Charles C. Rettberg, Alice C. Saylor, James C. Schultz, John MacDonald Smith, J. Thomas Tidd* and *Dennis W. Wilson*, were on the brief, for intervenor Association of American Railroads in 87-1125, 87-1171 and 88-1284.

Anna M. Kelly, Emried D. Cole, Jr., and *Paul R. Hitchcock* filed a joint brief for intervenors The Indiana Harbor Belt Railroad Co. and the Baltimore and Ohio Chicago Terminal Railroad Co. in 87-1125, 87-1171 and 88-1284.

Lawrence M. Cohen and *Shayle P. Fox* filed a brief for *amicus curiae* Rescar, Inc. urging that the petitions be granted.

William Henry Barrett also entered an appearance for *amicus curiae* Rescar, Inc.

Before: SILBERMAN, WILLIAMS and SENTELLE, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* SILBERMAN.

SILBERMAN, *Circuit Judge*: In these consolidated cases, petitioners [1] request review of the Interstate Commerce Commission's reversal of a forty-year old policy that substantially prevented railroads from charging the owners of private railcars for the costs of transporting their cars (when empty) to repair depots for ordinary main-

[1] We use the term "petitioner" to refer collectively to petitioners General American Transportation Corporation, General Electric Railcar Services Corporation, Union Tank Car Company, and intervenors in support of petitioners Chemical Manufacturers Association, MBF Industries, Inc., U.S. Clay Producers Traffic Association, and LO Shippers Action Committee ("LOSAC").

tenance. We hold that the Commission's reinterpretation of the statute is permissible and rationally explained, and further conclude that it was within the Commission's discretion to apply its new policy retroactively to the parties before it in this adjudication. Accordingly, we deny the petitions in all respects.

I.

Railroads, pursuant to their common-carrier obligations under the Interstate Commerce Act, must provide railcars suitable for the transportation of a broad range of property, including agricultural products, flammable liquids, as well as crated freight. In part because of these diverse requirements, it has proved impracticable for rail common-carriers to invest the capital necessary for the acquisition of general-use and specialty rolling stock. Carriers, therefore, commonly lease railcars both from firms in the business of supplying railcars and, occasionally, from shippers themselves. Under these leasing arrangements, railroads fulfill their common-carrier obligation to make available suitable railcars by paying car providers their costs of owning the rolling stock through a variety of means, including direct "mileage allowances" and offsets on line-haul freight tariffs.

Railcars "provided" to railcars in this manner accrue a substantial amount of "empty mileage"—mileage traveled without carrying any freight—in part because railcars commonly make a so-called "empty return." Railroads are not permitted to charge the railcar owners or car providers separately to return an empty car to the point of origination; instead, carriers may recover the cost of an empty return only by incorporating it in their rates for the line-haul movement of freight. In addition, railcars are periodically moved empty to repair depots selected by car providers. Up until the challenged order was filed, the Commission treated such empty-repair mileage identically to empty-return mileage by

prohibiting carriers (in most circumstances) from charging car providers separately for empty-repair moves. In a 1977 adjudication involving many of the parties before us today, *see General Am. Transp. Corp. v. Indiana Harbor Belt R.R. Co.*, 357 I.C.C. 102 (1977). (*"Indiana Harbor I"*), *aff'd sub nom. Indiana Harbor Belt R.R. Co. v. General Am. Transp. Corp.*, 577 F.2d 394 (7th Cir. 1978), the Commission reaffirmed its then longstanding prohibition on empty-repair-move charges. It held that private railcars moving empty for repair continued to serve as "instrumentalities of transportation" during such movements since repairs enabled railroads to maintain their use of such cars for revenue-generating purposes. Accordingly, the Commission concluded that empty-repair moves were *not* "distinct rail services" for which railroads could impose a separate tariff; rather, such moves were deemed a collective responsibility of those carriers who derive more than *de minimus* economic benefit (through line-haul freight charges) from the use of privately-owned railcars. 357 I.C.C. at 126-27.

Whatever its merits, *Indiana Harbor I*'s regime of collective railroad responsibility for empty-repair moves left certain carriers (predominantly switching or terminating railroads)[2] with an empty-repair mileage burden considerably out of proportion to the economic benefit those carriers derived from the line-haul movement of freight. And cross-subsidization among railroads was not the only perceived evil of *Indiana Harbor I*: the rule was believed to encourage inefficient depot selections because the costs of empty-repair transportation were imposed on parties other than those selecting the repair depot locations. In 1983, the Indiana Harbor Belt Railroad ("IHB") and the Baltimore & Ohio Chicago Terminal Railroad Company ("BOCT"), two carriers that found themselves dis-

[2] "Switching railroads" include short lines that transfer cars between line-haul networks, while "terminating railroads" provide service at either end of a commonly-traversed network.

advantaged by *Indiana Harbor I*, filed proposed tariffs for empty-repair moves in an effort to prompt the Commission to change course. The IHB and the BOCT contended that the statutory basis for the theory of collective responsibility had been undermined by recent congressional enactments designed to give railroads greater flexibility in imposing tariffs for rail services. The proposed tariffs elicited virtually immediate complaints from car providers,[3] and the instant proceeding began.

After an initial dismissal of the complaints by an administrative law judge and a subsequent reversal by the ICC Review Board (holding that *Indiana Harbor I* controlled the case), the complaints were appealed to the full Commission in July 1984. The ICC stayed the Review Board's order and published a notice in the Federal Register indicating that it was considering modifying or reversing *Indiana Harbor I*. *See* 49 Fed. Reg. 39,740 (1984); *see also* 50 Fed. Reg. 10,867 (1985) (soliciting additional comments). The Commission thereafter reopened the record underlying the complaints before it (and in *Indiana Harbor I*) and invited industry comments concerning, among other issues, whether or not the prohibition against empty-repair-move charges was efficient and equitable.

Three years later, after compiling an extensive record, the Commission reversed *Indiana Harbor I* and ruled that carriers may impose tariffs on car providers for empty-repair moves. *See General Am. Transp. Corp. v. Indiana Harbor Belt R.R. Co.*, 3 I.C.C.2d 599 (1987) ("*Indiana Harbor II*"). The Commission revisited the statutory questions analyzed in *Indiana Harbor I* and concluded that the Interstate Commerce Act, at least after its amendment by the Railroad Revitalization and

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[3] The complainant car providers unsuccessfully sought interim ICC suspension of the proposed tariffs. *See* 49 U.S.C. § 10707 (1982) (providing suspension authority).

Regulatory Reform Act ("the 4R Act")[4] and the Staggers Act[5] does not prohibit carriers from imposing an initial charge on car providers for empty-repair moves. *See Indiana Harbor II* at 606-11. The ICC further explained that permitting carriers to impose initial repair-move-charges would redress the problem of intercarrier misallocation of empty-repair-mileage burdens and improve efficiency in the selection of repair depots by placing empty-repair-transportation costs, in the first instance, on car providers. *See id.* at 613-16. The ultimate responsibility for the costs of owning railcars, including the costs of empty-repair moves, would continue to be transferred to railroads through customary channels—such as mileage allowances. *See id.* at 614. Since the ICC concluded that *Indiana Harbor I*'s prohibition on empty-repair-move charges no longer was viable under the Act, it upheld the empty-repair tariffs in the adjudication before it. *See id.* at 620.

The Commission subsequently denied petitioners' request for reconsideration of its *Indiana Harbor II* ruling, setting the stage for this proceeding. Before us, petitioners argue that *Indiana Harbor I*'s prohibition of empty-repair charges is specifically required under the Interstate Commerce Act; that *Indiana Harbor II* rests on an unreasonable construction of the Act and is not supported by a consideration of the legally relevant policy considerations; and that it was unlawful for the Commission to apply *Indiana Harbor II* retroactively to the specific empty-repair tariffs challenged in the underlying adjudication.

II.

We are initially faced with the argument that the Commission's decision fails the first prong of the *Chevron* test that governs federal judicial review of agency statu-

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[4] Pub. L. 94-210, 90 Stat. 31 (1976).

[5] Pub. L. 96-448, 94 Stat. 1895 (1980).

tory interpretation. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). The Commission's decision, we are told, runs counter to a specific legislative intent barring carriers from charging for the empty movement of privately-owned railcars for repair. We think this contention is insubstantial: neither the statutory language nor its legislative history clearly addresses the point at issue.

Petitioners contend that the Act specifically prohibits carriers from assessing charges for the movement of instrumentalities of transportation not carrying property, and that Congress intended railcars moving empty for repair to be treated as instrumentalities. Petitioners cite 49 U.S.C. §§ 10761(a)[6] and 10102(26)[7] to support their argument, but we find their appeal to those sections of the Act misdirected. Taken together or apart, these passages do not address the issue we confront. Section 10761(a), as petitioners recognize, merely imposes a

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[6] Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter.

49 U.S.C. § 10761(a) (1982).

[7] In this subtitle—

* * *

(26) "transportation" includes—

(A) a locomotive, car, vehicle, motor vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, regardless of ownership or an agreement concerning use; and

(B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property.

49 U.S.C. § 10102(26) (1982).

tariff publication requirement on carriers offering transportation or services within the jurisdiction of the Commission, and in no way purports to restrict categorically the types of services for which tariffs may be imposed. And section 10102(26)'s sweeping definition of transportation plainly hurts, rather than helps, petitioners' strained construction.

Petitioners also rely on 49 U.S.C. § 10728, the provision that permits carriers to "establish separate rates for distinct rail services to [] encourage competition[,] promote increased reinvestment by rail carriers [, and] encourage . . . increased non-railroad investment in the production of rail services." 49 U.S.C. § 10728(a) (1982). The best that can be said for this provision, however, is that it begs the question of whether or not an empty-repair move constitutes one such distinct service. To be sure, prior to the Commission's reversal in *Indiana Harbor II*, the Seventh Circuit twice approved the Commission's former position that empty-repair moves were not distinct rail services, *see Indiana Harbor Belt R.R. Co. v. General Am. Transp. Corp.*, 577 F.2d 394 (7th Cir. 1978) (affirming *Indiana Harbor I* on direct review); *see also Evans Prods. Co. v. ICC*, 729 F.2d 1107 (7th Cir. 1984) (sustaining Commission's application of *Indiana Harbor I* to parties before the court), but neither decision rested on a construction of the Interstate Commerce Act, much less a finding of specific congressional intent. Rather, as we read the opinions, the court simply held that the *Indiana Harbor I* policy was not arbitrary and capricious. These prior judicial affirmations of *Indiana Harbor I* do not preclude the Commission from changing course now.

If specific intent is not found in the original legislation, petitioners argue, it was manifested when Congress legislatively ratified *Indiana Harbor I*. We find that contention equally unconvincing. Congress revisited the Interstate Commerce Act on two occasions subsequent to

Indiana Harbor I—in 1978 when it recodified the Act [8] and in 1980 when it approved the Staggers Act.[9] But we see no indication that Congress was either aware of or had approved the Commission's empty-repair-move policy when it recodified the "distinct rail services" provision in 1978 or in 1980 when it amended other portions of the Act. We have held that application of the legislative reenactment doctrine requires a showing of both congressional awareness and "express congressional approval of an administrative interpretation if it is to be viewed as statutorily mandated." *AFL-CIO v. Brock*, 835 F.2d 912, 915 (D.C. Cir. 1987); *see also UAW v. Brock*, 816 F.2d 761, 767 (D.C. Cir. 1987); *Association of American Railroads v. ICC*, 564 F.2d 486, 493 (D.C. Cir. 1977). Petitioners' argument thus is unavailing.[10]

III.

We turn to what we see as the heart of petitioners' case —that the Commission's empty-repair-move policy announced in *Indiana Harbor II* rests on an unreasonable construction of the Interstate Commerce Act. In this sec-

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[8] Pub. L. 95-473, 92 Stat. 1337 (1978).

[9] Pub. L. 96-448, 94 Stat. 1895 (1980).

[10] The Supreme Court has said, even absent proof of congressional awareness or approval, that "when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'" *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986) (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974)). However, whatever its weight, we believe such "evidence" is more relevant to *Chevron*'s second prong. In any event, we think the force of congressional silence is particularly weak in this case given the abundant evidence (which we discuss in Part III) that Congress, in passing the Staggers Act, wanted to put an end to ratemaking practices involving railroad cross-subsidization and other inefficiencies.

tion, we also address petitioners' challenge to the logic and rationality of the *Indiana Harbor II* decision, for we think the questions posed—has the Commission adopted an impermissible construction of the Act and is its empty-repair-move policy arbitrary and capricious—are quite similar.[11] Both questions require us to determine whether the Commission, in effecting a reconciliation of competing statutory aims, has rationally considered the factors deemed relevant by the Act. *See AFL-CIO v. Brock*, 835 F.2d at 917; *Natural Resources Defense Council v. EPA*, 824 F.2d 1146, 1163 (D.C. Cir. 1987); *Rettig v. Pension Benefit Guaranty Corp.*, 744 F.2d 133, 152 (D.C. Cir. 1984); *cf. NLRB v. United Food & Comm'l Workers Union*, 108 S. Ct. 413, 421 (1987) (stating that courts owe deference to agency interpretation "as long as [] interpretation is rational and consistent with statute").

While *Chevron* commands deference to the Commission's interpretation of the Act which it administers, we must "look to many factors, among them being the 'thoroughness, validity and consistency of . . . [the] agency's reasoning,' " in determining the precise weight to be assigned the Commission's construction in the case before us. *Orloski v. Federal Election Comm'n*, 795 F.2d 156, 164 (D.C. Cir. 1986) (quoting *Democratic Senatorial Campaign Comm. v. Federal Election Comm'n*, 454 U.S. 27, 37 (1981)). Here, of course, we are not asked to review an agency policy at the point of its initial adoption; the order under review represents a reversal of an agency interpretation in force more or less consistently since 1947. *See Union Tank Car Co.*, 268 I.C.C. 338 (1947). But that factor does not mean judicial deference is any less appropriate; indeed, *Chevron* itself involved an agency about-face on a significant question of statutory con-

[11] We do not understand petitioners independently to have challenged the Commission's application of *Indiana Harbor II* to the facts of this case, except inosfar as the Commission's retroactive application of the rule works injustice to the parties to the adjudication, a question we address in Part IV.

struction. *See Chevron*, 467 U.S. at 857-58. Under these circumstances, however, the Commission bears the burden of rationally explaining its departure from its previous interpretation. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41-44 (1983); *see also Natural Resources Defense Council v. EPA*, 725 F.2d 761, 767 (D.C. Cir. 1984). We think the Commission has discharged this responsibility in *Indiana Harbor II*.

A.

The Commission thought it appropriate to reexamine its empty-repair-move policy for two principal reasons. First, it believed the *Indiana Harbor I* rule, under which railroads that participate in some measure in the line-haul carriage of freight were forced to bear collective responsibility for the costs of empty-repair moves, resulted in an inequitable allocation of such costs among the participating carriers, *see Indiana Harbor II*, 3 I.C.C.2d at 604, and in the inefficient placement of empty-repair transportation costs on parties who did not select the repair depot. *See id.* at 611, 616. Integral to its conclusion about unfair intercarrier allocation was the Commission's disenchantment with its so-called "equalization rule" [12] as a means to mitigate cross-subsidization among

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[12] The equalization rule in effect at the time of the decision in *Indiana Harbor II* required car providers whose cars accumulated empty mileage in excess of 106% of loaded revenue mileage to pay a tariff on such excess mileage to a common pool administered by a carrier association. The association, in turn, distributed accumulated revenues to individual carriers in accordance with each carrier's excess empty mileage burden. The 106% figure was designed to account for both empty-return mileage (100% of revenue mileage) and reasonable empty-repair mileage (an additional 6% of revenue mileage).

We note that petitioners' theory—under which all costs of empty-repair moves are presumptively the collective responsibility of carriers—is somewhat inconsistent even with the equalization rule, under which at least a portion of these costs may be borne by car providers if their cars accrue excess non-revenue mileage.

railroads. *See id.* at 605-06. Second, the Commission observed that the legislative environment in which the empty-repair-move rule was announced in *Union Tank* and affirmed in *Indiana Harbor I*—had shifted from acceptance of notions of collective railroad responsibility and cross-subsidization among carriers to congressional disapproval of those same ideas. *See id.* at 607, 610-11. By the time it decided *Indiana Harbor II*, the Commission believed it was acting against a background of congressional desire for greater efficiency in the management of the nation's rail transportation system through increased reliance on market forces.

The record, it seems to us, adequately buttresses these conclusions. Evidence showed that the prior rule, which prohibited empty-repair charges if the carrier derived greater than *de minimus* revenues from the line-haul movement of freight, placed unfair burdens on certain carriers. And despite the expectations it expressed in *Indiana Harbor I*, *see Indiana Harbor I*, 357 I.C.C. at 125, the Commission was presented with abundant indications that the equalization rule was fundamentally ineffective in leveling the differential burdens imposed by its empty-repair charge scheme. Because the rule was designed primarily to address *provider* responsibility for excess non-revenue mileage, and as "there [was] no necessary relationship between each *carrier's* share of repair move responsibility in terms of loaded revenue miles and its participation in repair move operations," use of the equalization accounts could not be expected to prevent railroad cross-subsidization. *Id.* at 606 (emphasis added). The Commission cited the experience of one of the *Indiana Harbor II* carrier-parties to illustrate its point: between 1978 and 1982 the IHB had performed empty-repair switching services which, if charges had been allowed, would have earned the carrier $856,452. Yet the IHB recovered only $96,263 under the equalization rule for the services in question. *See* 3 I.C.C.2d at 604. Per-

mitting carriers to charge for empty-repair moves, the Commission thought, would resolve the intercarrier-allocation problem without doing violence to the principle of carrier responsibility for the costs of owning railroad cars, for car providers could simply combine the costs of empty-repair moves with other costs of ownership in charging the railroads mileage allowances.[13] *Indiana Harbor II* was described by the Commission as, in large measure, a change in the "methods of accounting for the repair cost element of private car owners' expenses." 3 I.C.C.2d at 10.

Recent rail transportation legislation supports the Commission's judgment that Congress intended the Interstate Commerce Act to be administered with an eye toward eliminating inefficient ratemaking practices. The Commission cited various provisions in the 4R and Staggers Acts, not as reflective of Congress' specific intent on the question, but rather as indicative of the tension between *Indiana Harbor I*'s collective-responsibility rationale and general congressional purposes. We think the Commission permissibly discerned an emerging congressional purpose to permit carriers to price their services efficiently in accordance with both the costs properly chargeable to such services and market forces in order to "provide *all* carriers with a realistic opportunity to earn adequate revenues." 3 I.C.C.2d at 611 (emphasis added). The Commission relied on language in sec-

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[13] The Commission concluded as well that allowing carriers initially to impose charges for empty-repair moves would place the costs of such moves on the parties selecting the repair depots —the car providers—and thus promote more efficient depot selections by forcing providers to consider transportation as well as repair costs. *See* 3 I.C.C.2d at 611. Petitioners insist that the 106% equalization rule already encourages car providers to designate the "closest suitable repair shop" by penalizing providers if their cars accrue excess non-revenue miles. The Commission reasonably believed, however, that *Indiana Harbor II* would bring about efficiency gains in repair depot selections vis-a-vis the prior regime by enabling car providers to account more precisely for the transportation costs associated with the choice of a particular repair shop.

tion 101(a) of the Staggers Act stating that "it is the policy of the United States Government [] to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail," 49 U.S.C. § 10101a(1) (1982), to "promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues," *id.* § 10101a(3), and "to encourage . . . efficient management of railroads and . . . the elimination of noncompensatory rates." *Id.* § 10101a(10). The Commission found further support for this notion in statutory provisions that appear to disapprove of rates that "do not contribute to going concern value" and "encourage[] cross-subsidization." 3 I.C.C.2d at 611; *see* 49 U.S.C. § 10701a(b)(3) ("the Commission shall recognize the policy of this [Act] that rail carriers shall earn adequate revenues"); *id.* § 10701a(c) ("[a]ny rate for transportation . . . that does not contribute to the going concern value of [the] carrier is presumed to be not reasonable"); *id.* § 10704(a)(2) (Commission shall enable carriers to earn adequate revenues); *id.* § 10707a(e)(2) (Commission shall consider the extent to which rates which do not contribute to going concern value can be changed).

Of course, these provisions do not *compel* the approach adopted by the Commission in *Indiana Harbor II*. None of the provisions is specifically directed to relations between carriers and car providers. Taken together, though, the passages support the reasonableness of the Commission's construction of the Act. Congress' objective of an efficient railroad rate structure, and its attendant goal of ensuring that *individual* carriers have the opportunity to earn adequate revenues, at minimum runs counter to *Indiana Harbor I*'s premise of collective responsibility. We think, then, that the Commission has tendered a facially adequate explanation for reversing its course by demonstrating how the factual and legal pred-

icates that underlay *Indiana Harbor I* were either misconceived originally or have since substantially eroded.

Petitioners and intervenor LOSAC nevertheless attack the internal logic and consistency of the Commission's reasoning. LOSAC argues that the premises of the Commission's "accounting change" and "revenue adequacy" explanations of *Indian Harbor II* are fundamentally inconsistent; the former implicitly assumes that as between railroads and car providers generally, *Indiana Harbor II* will be revenue-neutral, while the latter—focused on increased revenues for railroads—explicitly assumes otherwise. LOSAC misapprehends the Commission's justification, however. The ICC's concerns over "revenue adequacy," driven in large part by changes in congressional policy (evidenced in the Staggers Act) had little to do with carriers *generally*, as LOSAC assumes; rather, the Commission was concerned with the distributive inequity of saddling *certain* carriers with a disproportionate share of the empty-repair-move burden. 3 I.C.C.2d at 604. Characterized property, the Commission's "revenue adequacy" and "accounting change" explanations are complementary, not antagonistic.

Still, LOSAC charges that the Commission's "accounting change" justification by itself does not withstand scrutiny. It is argued that *Indiana Harbor II* is a good deal more than a simple change in accounting methods; granting railroads permission to charge "initially" for empty-repair moves will enable carriers to shift these costs (or at least some of them) to car providers, in violation of the Act's implicit discretion that railroads bear the costs of owning railcars used in fulfillment of their common-carrier obligations. *See, e.g.*, 49 U.S.C. § 11121 (a) (1982) (providing that rail carriers "shall furnish safe and adequate car service"); *Pennsylvania R.R. Co. v. Puritan Coal Mining Co.*, 237 U.S. 121 (1915) (same). Car providers, according to LOSAC, are not assured that they will, in turn, be able to pass the costs of empty-

repair moves back through to carriers through mileage allowance charges, contract offsets, or otherwise. This is so because in recent years carriers have proved reluctant to update allowances in accordance with increases in costs of ownership, and have imposed arbitrary "caps" on mileage formulas. Under the ICC's recent decision in *LO Shippers Action Comm. v. Aberdeen & Rockfish R.R. Co.*, 4 I.C.C.2d 1 (1987), *aff'd sub nom. LO Shippers Action Comm. v. ICC*, 857 F.2d 802 (D.C. Cir. 1988), moreover, railroads have no obligation under the Interstate Commerce Act to reimburse car providers, through allowances, for their *complete* cost of ownership. Instead, the statute permits the Commission, in exercising its discretionary power to regulate car allowances, to look beyond historical costs to car providers to such factors as conditions in the railcar market. *See* 49 U.S.C. § 11122(b) (1982) ("In determining the rate of compensation [to car providers], the Commission shall consider . . . the national level of ownership of each type of freight car, and other factors that affect the adequacy of the national freight car supply."); *LO Shippers Action Comm.*, 4 I.C.C.2d at 10. LOSAC therefore contends that it was flatly wrong for the Commission to assume that empty-repair-move costs would continue to be borne by carriers.

To be sure, the Commission may have been a bit facile in its initial opinion in suggesting that its decision involved only an accounting change that would have little or no impact in determining who—as between carriers and car providers—would bear the burden of the costs involved. In its order on rehearing, however, the Commission conceded that car providers may be unable to recoup completely the costs of empty-repair moves from railroads, just as conditions in the railroad market might prevent providers from recovering on a dollar-for-dollar basis their other costs of ownership. And the Commission reiterated, in any event, that the statute simply does not guarantee providers full cost recovery.

We see nothing irrational in the Commission's approach, as clarified on rehearing, toward accounting for empty-repair move costs. It is quite incorrect to assume, as petitioners do, that the Interstate Commerce Act requires the Commission to treat empty-repair-move costs differently than other costs of owership. As the Commission observed, it would be anomalous to segregate the empty-repair-move component of ownership costs for separate treatment:

> The railroads' obligation to compensate car owners for costs of ownership still exists, but the most plausible statutory basis for discharging that obligation within the regulatory framework of published rates is section 11122, which governs private car compensation generally.

Order on Reconsideration at 2. Private car providers have no statutory right to insulate themselves from market forces generally in fixing allowances to be paid by carriers for the use of railcars. It follows that providers have no right to sequester the empty-repair-move component of ownership costs from market forces either. As the Commission stated in *LO Shippers Action Comm.*, "allowing market based car hire returns, instead of prescribing fixed returns, best accommodates the various factors [the Commission is] required by [section 11122 of thhe Act] to consider." 4 I.C.C.2d at 14. It seems reasonable, we think, for the Commission to conclude that what is appropriate for ownership costs generally is perfectly appropriate for the discrete ownership costs at issue in this case.

The foregoing analysis, in our opinion, fairly disposes of petitioners' related charge that it was irrational for the Commission to attempt to solve a problem of *inter*-carrier cost allocation with the solution of an *extra*-carrier (car provider) charge. The argument assumes, in the first instance, that an extracarrier charge for empty-repair moves is otherwise illegitimate under the

Act, an assumption that the Commission has adequately rebutted. The Commission made clear, moreover, that it was the anomaly of treating empty-repair-move costs differently than other costs of ownership (as a collective responsibility of the railroad industry rather than a cost to be borne in direct proportion to a carrier's use of private railcars in the line-haul carriage of freight) that produced the problem of intercarrier cost misallocation. Petitioners' argument, it seems to us, runs aground on section 11122 of the Act, which plainly contemplates initial railroad charges for freight movements with a "pass-back" of ownership costs to carriers through allowances.[14]

B.

Petitioners also contend that the Commission failed to pay heed to numerous legally relevant considerations in fashioning its empty-repair-move policy in *Indiana Harbor II*. It is argued that, prior to reversing *Indiana Harbor I* and allowing carriers to charge for empty-repair moves, the ICC should have undertaken an examination of the techniques by which car providers would be able to recoup empty-repair-move costs from railroads. In other words, because the Commission rested its deci-

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[14] Petitioners' assertion that the railroads' imposition of empty-repair tariffs constitutes "double-charging" for empty moves in violation of sections 10701(a) (prohibiting unreasonable practices) and 11121(a) (prohibiting unreasonable car service practices) of the Act is hyperbole. It is by no means necessarily true that the railroads will be able to "double-charge" for empty-repair moves under *Indiana Harbor II*. Rail tariffs are influenced by a number of factors of which the cost of railcar ownership is only one; depending on conditions in the relatively discrete freight transportation and railcar markets, railroads may over- or underrecover from shippers the costs of railcar ownership passed through to them by car providers. The Commission, in all cases, remains empowered to respond to specific practices in connection with railroad payment of allowances under section 11121(a). In the order under review, in fact, the Commission reserved such issues as the legitimacy of mileage allowance caps and the like for future proceedings on a case-by-case basis. *See Indiana Harbor II*, 3 I.C.C.2d at 615.

sion in part on the assumption that car providers could use mileage allowance systems and other measures to recover empty-repair-move costs, the Commission was obliged *in the same proceeding* to engage in full-scale scrutiny of those recovery systems.[15]

We disagree. We are persuaded that the Commission need not have undertaken the elaborate inquiry into mileage allowances requested by petitioners in the *Indiana Harbor II* proceeding. Petitioners do not complain of any *regulatory* obstacle to recovery of empty-repair-move costs from carriers, a concern that might warrant immediate Commission attention. Instead, the car providers cite market forces alone as impeding full recovery. But the Commission has recently decided to allow market forces to influence rates of compensation to car providers, *see LO Shippers Action Comm.*, 4 I.C.C.2d at 13-14, and we see no reason why the Commission should be prevented from giving the market some opportunity to assimilate repair-move costs before entertaining a challenge to the adequacy of mileage allowances under section 11122.

The Commission reasonably determined, moreover, that at least some of the mileage-allowance recovery issues raised by petitioners, such as the propriety of railroad mileage caps, involve the effectiveness of allowances in enabling car providers to recover costs of ownership *generally*, and do not bear directly or exclusively on repair-move costs. And, the Commission observed that it was presently entertaining caps and allowance questions in other proceedings. Petitioners fail to show why their rights under section 11122 would not be protected in a separate adjudication. We have no legitimate grounds, under these circumstances, to quarrel with the Commis-

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[15] To the extent petitioners' argument stems from the notion that the Interstate Commerce Act requires dollar-for-dollar recovery of the car providers' complete costs of ownership, we have adequately addressed it above. *See supra* p. 18.

sion's procedural determination concerning the limited scope of the *Indiana Harbor II* proceeding. "[A]gencies . . . need not deal in one fell swoop with the entire breadth of a novel development; instead, 'reform may address itself to the phase of the problem which seems most acute to the [regulatory] mind.'" *National Ass'n of Broadcasters v. FCC*, 740 F.2d 1190, 1207 (D.C. Cir. 1984) (quoting *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955)).

Petitioners also assert that the Commission arbitrarily neglected to consider those long-term contractual relationships between railroads, car providers, and shippers which were negotiated in reliance on *Indiana Harbor I*. We are told that many car manufacturers lease railcars to shippers who, in turn, "provide" the cars to railroads for the transportation of freight. Under typical agreements, the manufacturer-owner receives a flat-rate lease payment from the lessee while the lessee pockets any mileage allowances paid by railroads;[16] no mention is made in these agreements of empty-repair-move charges, because *Indiana Harbor I* severely restricted the circumstances under which such charges could be assessed by carriers. Superimposing *Indiana Harbor II*'s regime on these arrangements, it is asserted, will require manufacturer-owners to remit empty-repair-move charges to the railroads without any means of recovering these payments from the car lessees. Similarly, petitioners contend that shippers who have negotiated long-term contract rates with carriers, *see* 49 U.S.C. § 10713 (1982) (providing authority for, and regulating, contract rates for rail transportation in lieu of published tariffs), which rates presumably incorporate an offset amount reflecting the shippers' cost of providing railcars but do not cur-

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[16] While mileage allowances, under prevailing practices, are tendered by railroads to manufacturer-owners, petitioners assert that the typical lease agreement requires the owner to credit these allowances to the lessee.

rently account for the possibility of shipper-borne empty-repair charges, will be harmed by *Indiana Harbor II*.

The gist of petitioners' objection, it seem to us, is that the Commission's previous policy induced railroads, car providers, and shippers to do business one way, and that these settled business practices cannot be overridden by developments in the Commission's regulatory policies no matter how compelling the statutory justifications. This argument assumes incorrectly, we think, that industry practices may prevent the Commission from implementing even a justified and well-explained departure from previous policy. That is simply not sound administrative law. *See Norman v. Baltimore & Ohio R.R. Co.*, 294 U.S. 240, 307-08 (1935) ("when contracts deal with a subject matter which lies within the control of the Congress, they have a congenital infirmity"); *New England Tel. & Tel. Co. v. FCC*, 826 F.26 1101, 1110 (D.C. Cir. 1987); *see also J.I. Case Co. v. NLRB*, 321 U.S. 332, 337 (1944).

Petitioners' last objection to the reasonableness of the Commission's decision is that the ICC neglected to devote sufficient attention to numerous alternative intercarrier schemes—not requiring the reversal of *Indiana Harbor I*—that allegedly would cure intercarrier cost allocation problems. The Commission failed, we are told, to discuss the option of "intercarrier pooling," under which railroads would pool a percentage of their line-haul freight revenues for distribution among carriers in proportion to their repair-movement burden. Other options, such as intercarrier litigation over "excess" line-haul receipts and more adequate parent contributions of a portion of their line-haul freight revenues to their switching subsidiaries, were allegedly dispensed with by the Commission without adequate consideration or explanation. This "'artificial narrowing of options,'" according to petitioners, cannot be countenanced. *International Ladies Garment Workers Union v. Donovan*, 722 F.2d 795, 817 (D.C. Cir. 1983) (quoting *Pillai v. Civil Aeronautics Board*, 485 F.2d 1018, 1027 (D.C. Cir.

1973)); *see State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 46-48.

This is not a case, however, where the Commission labored under a misperception that the policy ultimately selected was "the only available alternative." *Pillai*, 485 F.2d at 1027. The record reveals that the Commission deliberated upon all three "alternatives" advanced by petioners prior to settling on the option of allowing empty-repair move charges. *See Indiana Harbor II*, 3 I.C.C.2d at 611-13. The "intercarrier litigation" alternative was reasonably viewed as "complex, costly, and impractical" given the extreme difficulty of determining the extent to which a particular "overcompensated" carrier has been enriched at the expense of a complaining switching carrier. *Id.* at 612-13. The "parent-subsidiary contribution" alternative, while it might redress imbalances between certain discrete carriers, was also viewed as ill-suited to the resolution of an industry-wide problem because not all undercompensated switching carriers are owned by overcompensated line-haul carriers. *Id.* at 612. Finally, the record was deemed inconclusive on the question of the viability of intercarrier pooling of line-haul freight revenues; "little was said by the parties about it" even though the alternative was identified by the Commission in soliciting public comments. *Id.* at 613. The Commission reasonably believed, nevertheless, that permitting carriers to charge for repair moves was simpler than "establish[ing] a second elaborate system of allocating repair-movement responsibility among individual carriers," as "systems are already in place for handling other private car repair and car supply costs." *Id.* at 614.[17] No further consideration of the alternatives

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[17] The Association of American Railroads argues that the ICC has no authority to direct carriers to contribute to an intercarrier pool. *See* 49 U.S.C. § 11342 (1982). Since the Commission did not embrace this view, however, we cannot consider the point in testing the Commission's consideration of available alternatives.

proffered by the car providers, in our view, was legally required.

We conclude, therefore, that the Commission's empty-repair-move policy is based both on a permissible construction of the Interstate Commerce Act and on reasoned scrutiny of the legally relevant considerations. The only question that remains is whether or not the Commission could lawfully apply its new controlling principle to the parties before it in *Indiana Harbor II*.

IV.

Petitioners advance two arguments against the lawfulness of "retroactively" sanctioning the repair-move charges filed by the IHB and the BOCT and challenged by shippers in *Indiana Harbor II*. First, they characterize the Commission's action in *Indiana Harbor II* as a rule, which, under the Administrative Procedure Act, may be given prospective effect only. Second, petitioners argue that even if *Indiana Harbor II* is labeled an adjudication, retroactive application of the Commission's new empty-repair-move policy to the parties in this case violated fundamental principles of fairness. We find neither argument persuasive.

We need not dwell at length on petitioners' assertion that *Indiana Harbor II* was a retroactive rulemaking. The former policy largely prohibiting empty-repair-move charges was articulated in an adjudicatory proceeding, and *Indiana Harbor II* itself was an adjudication. It seems to us presumptively reasonable that a controlling principle announced in one adjudication may be modified in a subsequent adjudication, and petitioners offer little to question that presumption here. As we have said before, "[a]djudicatory decisions do not harden into 'rules' which cannot be altered or reversed except by rulemaking simply because they are longstanding." *See Chisholm v. FCC*, 538 F.2d 349, 365 (D.C. Cir. 1976). Petitioners conceded at argument that, in selecting a controlling

principle to govern the dispute before the Commission in *Indiana Harbor II*, the Commission was at the very least empowered to apply that principle in the future to similarly situated parties. Indeed, basic tenets of administrative law *require* the Commission to apply its rules consistently in adjudicatory proceedings. *See generally Atchison, T. & S.F. Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 807-09 (1973). That *Indiana Harbor II* established an adjudicatory policy to be applied in the future, as well as to the parties before the Commission, is thus of no moment.

Petitioners point to the Commission's requests for public comments under 5 U.S.C. § 553 and contend that that procedure somehow "converted" *Indiana Harbor II* into an informal rulemaking, *see* 50 Fed. Reg. 10,867 (1985); 49 Fed. Reg. 39,740 (1984), thereby rendering retroactive application of the empty-repair-move policy unlawful. Yet petitioners cite no authority for their theory that an adjudication is converted into a rulemaking solely because an agency solicits and entertains the comments of those who have an interest in prospective application of the principle under study, and we have found none. Certainly, the practice of permitting amicus filings in judicial proceedings has never been thought a basis for equating judicial decisions with legislation. So we reject petitioners' novel contention.

Relying on our opinion in *Retail, Wholesale and Department Store Union v. NLRB*, 466 F.2d 380 (D.C. Cir. 1972), petitioners argue in the alternative that even if *Indiana Harbor II* is regarded as an adjudication, retroactive application of the new empty-repair policy is contrary to law. Petitioners purport to apply the five-factor balancing test [18] set forth in *Retail, Wholesale* and insist

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[18] Among the considerations that enter into a resolution of the [retroactivity] problem are (1) whether the particular case is one of first impression, (2) whether the new rule represents an

that the statutory interest in applying the new rule to the parties' dispute in *Indiana Harbor II* is outweighed by the inequity involved in disappointing the car providers' reasonable expectations in reliance on longstanding Commission precedent. Of course, as the Supreme Court has observed, every administrative case in which a new or modified controlling principle is announced "has a retroactive effect," and such retroactivity is "not necessarily fatal to its validity." *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947). And because the Administrative Procedure Act does not countenance agency use of adjudicatory powers to announce rules of prospective effect only, *see NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 765-66 (1969) (opinion of Fortas, J.); *id.* at 777 (dissenting opinion of Douglas, J.); *id.* at 780 (dissenting opinion of Harlan, J.), it seems clear that the circumstances in which a rule may be announced but not applied in an adjudication are few. In part for this reason, courts have interpreted the *Retail, Wholesale* test to bar retroactive application of a new rule only when such application would work a "manifest injustice." *Clark-Cowlitz Oper. Agency v. FERC*, 826 F.2d 1074, 1081 (D.C. Cir. 1987) (en banc).

We do not find the parties' reliance interest in the *Indiana Harbor I* regime to be so great as to warrant the conclusion that retroactive application of the *Indiana Harbor II* empty-repair policy works a "manifest injustice." Soon after the IHB and the BOCT filed their empty-repair tariffs but prior to their effective date, the

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abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.

Retail, Wholesale, 466 F.2d at 390.

parties sought ICC suspension of the tariffs as unlawful, *see* 49 U.S.C. § 10707 (1982) (providing Commission suspension authority); *Southern Ry. Co. v. ICC*, 681 F.2d 29 (1982) (describing suspension power), yet the ICC declined to exercise its interim authority. If this action alone did not suggest to petitioners that *Indiana Harbor I* was being drawn into question, the Commission's 1984 order staying the Review Board's decision that struck down the tariffs removed all doubt about the Commission's inclination. In that order the Commission indicated that the railroads had a "substantial" chance of prevailing in defense of their empty-repair-move tariffs. Thus, for most of the period for which petitioners claim retroactive application of *Indiana Harbor II* is unfair, petitioners have been aware of *Indiana Harbor I*'s vulnerability. The parties' reliance interest in *Indiana Harbor I* must be discounted accordingly.

Turning to the other side of the equation, we (like the Commission) think the statutory interest in having *Indiana Harbor II* apply retroactively is significant in this case. The record before the Commission provided abundant support for its conclusion that the IHB and the BOCT were receiving insufficient compensation through line-haul freight traffic for their handling of empty-repair movements, a predicament in tension with the Staggers Act's objective of providing carriers an opportunity to earn adequate revenues. Under the circumstances, we believe it was perfectly appropriate for the Commission "to apply the law in effect at the time it render[ed] its decision." *Bradley v. Richmond School Bd.*, 416 U.S. 696, 711 (1974).

For the reasons stated, the petitions for review are

Denied.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-1125

GENERAL AMERICAN TRANSPORTATION CORPORATION, *et al.*,
Petitioners

v.

INTERSTATE COMMERCE COMMISSION AND
UNITED STATES OF AMERICA,
Respondents

LO SHIPPERS ACTION COMMITTEE,
BALTIMORE AND OHIO CHICAGO TERMINAL RAILROAD CO.,
U.S. CLAY PRODUCERS TRAFFIC ASSOCIATION, INC.,
ASSOCIATION OF AMERICAN RAILROADS,
CHEMICAL MANUFACTURERS ASSOCIATION,
Intervenors

and Consolidated Cases No. 87-1171 and 88-1284

Petitions for Review of an Order of the
Interstate Commerce Commission

Before: SILBERMAN, WILLIAMS and SENTELLE, *Circuit Judges.*

JUDGMENT

[Filed April 14, 1989]

These causes came on to be heard on the petitions for review of an order of the Interstate Commerce Commission and were argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by the Court, that the petitions for review are denied, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
FOR THE COURT:

/s/ Wendy Jenuis
for CONSTANCE L. DUPRE
Clerk

Date: April 14, 1989

Opinion for the Court filed by Circuit Judge Silberman.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Filed June 30, 1989

No. 87-1125

GENERAL AMERICAN TRANSPORTATION CORPORATION, *et al.*,
Petitioners

v.

INTERSTATE COMMERCE COMMISSION
UNITED STATES OF AMERICA,
Respondents

LO SHIPPERS ACTION COMMITTEE,
BALTIMORE AND OHIO CHICAGO TERMINAL RAILROAD CO.,
U.S. CLAY PRODUCERS TRAFFIC ASSOCIATION, INC.,
ASSOCIATION OF AMERICAN RAILROADS,
CHEMICAL MANUFACTURERS ASSOCIATION,
Intervenors

No. 87-1171

RAILWAY PROGRESS INSTITUTE COMMITTEE ON TANK CARS,
Petitioners

v.

INTERSTATE COMMERCE COMMISSION AND
UNITED STATES OF AMERICA,
Respondents

ASSOCIATION OF AMERICAN RAILROADS,
BALTIMORE AND OHIO CHICAGO TERMINAL
RAILROAD CO., *et al.*,

CHEMICAL MANUFACTURERS ASSOCIATION,
MBF INDUSTRIES, INC.,
Intervenors

No. 88-1284

RAILWAY PROGRESS INSTITUTE COMMITTEE ON TANK CARS, *et al.*,
Petitioners

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA,
Respondents

ASSOCIATION OF AMERICAN RAILROADS, BALTIMORE AND OHIO CHICAGO TERMINAL RAILROAD CO., *et al.*,
Intervenors

On Petition for Rehearing of Petitioners and Intervenors

Before SILBERMAN, WILLIAMS and SENTELLE, *Circuit Judges.*

ORDER

Upon consideration of the petition for rehearing of petitioners and intervenors, filed May 26, 1989, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:

CONSTANCE L. DUPRE
Clerk

A statement of Circuit Judge Silberman is attached.

SILBERMAN, *Circuit Judge*, joined by WILLIAMS and SENTELLE, *Circuit Judges, concurring in the denial of rehearing.*

Petitioners' primary claim in its petition for rehearing is that *Indiana Harbor II* was a rulemaking, unsuitable for retroactive application, because the Interstate Commerce Commission determined to seek industry comment on the issues framed by the parties to the adjudication. We rejected petitioners' argument, however, that the mere supplementation of an adjudicatory proceeding with comment procedures more commonly employed in a rulemaking necessarily means that the resulting procedure is rulemaking *per se*. Nothing in the Administrative Procedure Act restrains an agency from receiving (and crediting) comments in adjudicatory proceedings from nonparties who will inevitably be affected by the agency's contemplated change-in-course, whether through intervention or otherwise. *See* Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485, 536 (1970) ("the prescription of an adjudicatory hearing does not preclude an agency from allowing widespread industry and public participation through intervention and preservation of testimony in written affidavits"); Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 931 (1965) ("even in the course of adjudicatory proceedings, agencies are not powerless to permit general comment on proposed rules if they wish to do so").[1] Indeed, the courts and commentators that have suggested the inappropriateness of adjudicatory proceedings for certain matters have focused their attention on the unfairness of declining to give *nonparties*

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[1] The National Labor Relations Board appears to have followed this course in many of its adjudicatory proceedings. *See, e.g., General Cable Corp.*, 139 N.L.R.B. 1123 (1962); *Deluxe Metal Furniture Co.*, 121 N.L.R.B. 995 (1958).

notice and an opportunity to be heard in advance of the agency's selection of a new or altered governing principle. *See, e.g., Bell Aerospace Co. v. NLRB*, 475 F.2d 485, 494-97 (2d Cir. 1973), *rev'd*, 416 U.S. 267 (1974); 2 K. DAVIS, ADMIN. L. TREATISE 96 125-26 (1979); *cf. NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (opinion of Fortas, J.); *id.* at 777-79 (opinion of Douglas, J.); *id.* at 780-81 (opinion of Harlan, J.). I think *Indiana Harbor II*, which was *begun* as an adjudication by certain of the petitioners with the filing of a complaint against the railroads for their assessment of empty-repair-move charges, retained its fundamental adjudicatory character throughout.[2]

Underlying petitioners' argument that *Indiana Harbor II* was a rulemaking, it would appear, is the notion that an adjudicatory proceeding was an inappropriate forum for the Commission to have made a "legislative-type" judgment reversing its longstanding empty-repair-move policy. But the Supreme Court has repeatedly emphasized that the choice between rulemaking and adjudication "lies primarily in the informed discretion of the administrative agency." *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947). And when the Second Circuit Court of Ap-

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[2] It is unproductive, in most circumstances, to attempt to "classify a given proceeding as either adjudicatory or rulemaking. The line between the two is frequently a thin one and resolution of a given problem will rarely turn wholly on whether the proceeding is placed in one category or the other." *City of Chicago v. FPC*, 458 F.2d 731, 739 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1074 (1972). *But see Hoffman-LaRoche, Inc. v. Kleindienst*, 478 F.2d 1, 12-13 (3d Cir. 1973) (character of proceeding—whether adjudicatory or rulemaking—viewed critical given agency's failure to follow functional separation requirements of 5 U.S.C. § 554). Here, of course, the characterization of the proceeding below is important, for it bears directly on the propriety of retroactive application of the new governing principle. "[R]etroactivity is not only permissible but standard" in the adjudicatory setting, *Bowen v. Georgetown Univ. Hosp.*, 109 S. Ct. 468, 478 (1988) (Scalia, J., concurring), but it is disfavored in rulemaking. *See id.* at 471.

peals, in reliance on reasoning virtually identical to that subscribed to by petitioners, determined that a significant reversal in NLRB policy could not, under the circumstances, be effected through adjudication, the Supreme Court unanimously reversed, holding that the Board was "not precluded from announcing new principles in an adjudicative proceeding." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) (reversing *Bell Aerospace Co. v. NLRB*, 475 F.2d 485 (2d Cir. 1973)). While arguments no doubt can be advanced in support of limiting agencies' policymaking use of the adjudicatory form to circumstances where "legal consequences hinge upon the interpretation of statutory requirements, and where no pre-existing interpretive rule construing those requirements is in effect," *Georgetown Univ. Hosp.*, 109 S. Ct. at 480 (Scalia, J., concurring); *compare Ford Motor Co. v. FTC*, 673 F.2d 1008, 1009-10 (9th Cir. 1981), *cert. denied*, 459 U.S. 999 (1982), *with id.* at 1011-12 (Reinhardt, J., disenting from denial of rehearing *en banc*), the law of this circuit is emphatically to the contrary. *See, e.g., Airmark Corp. v. FAA*, 758 F.2d 685, 691-92 (D.C. Cir. 1985); *Hatch v. FERC*, 654 F.2d 825, 837 (D.C. Cir. 1981); *Florida Power & Light Co. v. FERC*, 617 F.2d 809, 816 (D.C. Cir. 1980); *Office of Communications of United Church of Christ v. FCC*, 590 F.2d 1062, 1070 (D.C. Cir. 1978); *Chisholm v. FCC*, 538 F.2d 349, 365 (D.C. Cir.), *cert. denied*, 429 U.S. 890 (1976); *but cf. American Fed'n of Gov't Employees v. FLRA*, 777 F.2d 751, 759 (D.C. Cir. 1985) (suggesting that rule established by rulemaking procedures can be modified or altered only by rulemaking procedures). What this case really reduces to is the fairness of retroactive application of the new principle developed in *Indiana Harbor II* to the adjudicatory parties, a question I believe is adequately addressed in the original panel opinion.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-1125

GENERAL AMERICAN TRANSPORTATION CORPORATION, *et al.*,
Petitioners

v.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA,
Respondents

LO SHIPPERS ACTION COMMITTEE, *et al.*,
Intervenors

And consolidated cases No. 87-1171 and 88-1284

Before: WALD, *Chief Judge*; ROBINSON, MIKVA, EDWARDS, RUTH B. GINSBURG, SILBERMAN, BUCKLEY, WILLIAMS, D.H. GINSBURG and SENTELLE, *Circuit Judges*

ORDER

[Filed June 30, 1989]

The suggestion for rehearing *en banc* of petitioners and intervenors has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

FOR THE COURT:
CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Chief Judge Wald and Circuit Judge Buckley did not participate in this matter.

APPENDIX E

ICC 132 *Served March 12, 1987*

INTERSTATE COMMERCE COMMISSION

No. 35404 [1]

GENERAL AMERICAN TRANSP. CORP.

v.

INDIANA HARBOR BELT RAILROAD CO.

Decided February 17, 1987

Commission overrules *Union Tank Car Co. Terminal Service*, 268 I.C.C. 338 and *General American Transp. Corp. v. Indiana Harbor*, 357 I.C.C. 102, and finds that rail carriers may charge for movements of privately owned cars to and from private facilities for ordinary maintenance and repair. Car suppliers should recover those costs with other costs of ownership through mileage allowances as market conditions permit. Relief sought in No. 39380 denied. Both proceedings discontinued.

DECISION

BY THE COMMISSION:

We are reversing the decision in *General American Transp. Corp. v. Indiana Harbor*, 357 I.C.C. 102 (1977) [2]

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[1] This decision embraces No. 39380, *General American Transp. Corp. et al. v. Baltimore and Ohio Terminal Railroad Co., et al.* (No. 39380).

[2] *Aff'd sub nom. Indiana Harbor R. Co. v. General Am. Transp.* 577 F.2d 394 (7th Cir. 1978).

(*Indiana Harbor*) and are allowing carriers to file tariffs containing charges for hauling empty, privately owned cars to and from repair facilities. We find that the existing policy prohibiting tariff charges misallocates economic burdens among carriers and conflicts with the Congressional mandate for demand-based rail pricing, rate flexibility, and revenue adequacy expressed in the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act) and the Staggers Rail Act of 1980. These charges are more properly considered a cost of repair to be included in the computation of mileage allowances that the railroads pay the shippers.

INTRODUCTION

Railroads have an obligation to provide cars necessary to transport the commodities that they hold themselves out to carry. *Allied Corp. v. Union Pacific Railroad Company* 1 I.C.C. 2d 480, 483 (1985). They may fulfill this obligation by furnishing their own cars or by using cars supplied by other carriers or private parties. *Sioux City Term. Ry. Switching*, 241 I.C.C. 53, 63 (1940).

Under 49 U.S.C. § 11122(b), "[t]he rate of compensation to be paid for each type of freight car shall be determined by the expense of owning *and maintaining* that type of freight car * * *" (Emphasis added.) The cost of repair is a cost of car ownership and is factored into the mileage allowance that the railroads pay to private car owners to reimburse them for providing the cars.[3]

Private car owners often perform maintenance and repair work themselves or contract it out to private repair firms. Association of American Railroads (AAR) proce-

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[3] Section 11122 also requires consideration of factors other than ownership cost, such as efficiency of car use and the national level of ownership, which may justify payment of allowances that do not fully cover ownership cost when, for example, the supply of cars exceeds the demand.

dures state that carriers should route cars in need of repair to repair shops designated by the car owner. However, carriers have not generally been permitted to charge for those movements. Past Commission decisions hold that, once private cars are put into service they are considered "instrumentalities of transportation" and their movement for repairs is considered the *collective* responsibility of the railroad industry. In *Union Tank Car Co. Terminal Service*, 268 I.C.C. 338 (1947) (*Union Tank*), the Commission concluded that such private cars were not "property" within the meaning of then-section 6(7) of the Act[4] and thus were not subject to charges because they do not lose their status as instrumentalities of transportation when taken out of service temporarily.

Indiana Harbor, *supra*, followed earlier Commission precedents and found that a railroad could not levy a direct charge for transporting privately owned cars (tank and others) to and from repair facilities if it derived more than *de minimis* revenue from loaded movements of such cars. 357 I.C.C. 126-27. The decision held that a railcar moving to or from a repair facility could either be considered the movement of "property" on which a transportation charge could be imposted, or an instrumentality of transportation, where no charge could be imposed for moving it. The decision explained that, for a car to to be treated as an instrumentality of transportation, a carrier must derive some economic benefit, direct or indirect, from its movement or use. Direct benefit was found to occur when the carrier derived revenue from the movement or use of the car. The Commission held an indirect economic benefit occurred when a carrier made use of private cars in general to fulfill its common carrier obligations.

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[4] Former § 6(7) stated, in essence, that except as otherwise provided, no carrier shall transport "passengers or property" unless its charges are published in an effective tariff. Section 6(7) has been recodified without substantive change in 49 U.S.C. § 10761(a).

In the *Indiana Harbor* decision, the Commission found that the Indiana Harbor Belt Railroad (IHB) derived more than a *de minimis* economic benefit from the use of private cars, since it earned substantial revenue from switching loaded movements of privately owned cars. The decision further found that the tank car 105% equalization rule[5] appeared to be a workable solution to the prob-

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[5] The mileage tariff for tank cars imposes an "equalization" rule which is used to encourage private tank car owners to handle their fleets more efficiently and reduce empty mileage. The 105% equalization rule provided that, if aggregate empty mileage accumulated annually by tank cars bearing the reporting mark(s) of any one company or person exceed the aggregate loaded mileage by more than 5%, then the assignee of the reporting mark(s) shall pay for such excess empty mileage at a stated mileage charge. Certain mileage was not included in the equalization accounting; namely: (1) mileage on empty cars moving on revenue bills; (2) loaded or empty mileage caused by railroad handling error; (3) repair movements required because of railroad damage; and (4) mileage accumulated due to (a) use of longer routes for railroad convenience, (b) detours, and (c) Commission service orders.

Carriers submit detailed monthly mileage reports to the assignee of each reporting mark showing the actual loaded and empty mileage for all cars bearing each reporting mark and send a duplicate of that summary report to the AAR. Provisions are made for adjusting errors.

Annually each carrier sends AAR a summary of total loaded and empty mileage aggregated on its line during the calendar year, separated by reporting marks. The AAR adds the loaded and the empty mileage reported by all carriers for cars assigned to each company or person, and if empty mileage exceeds loaded mileage by more than 5% AAR sends a bill for the excess at the rule's mileage charge. It then distributes the charges thus collected to the carriers in the proportion that each carrier's portion of excess mileage bears to the total excess empty mileage.

The current equalization rule is essentially the same. Under it private tank car owners are assessed a current charge of 32¢ per mile for all empty miles accumulated during a calendar year that exceed total loaded mileage by more than 6%. The equalization accounting now excludes excess mileage resulting from Department of Transportation mandated retrofit programs and from an AAR mandated car protection program. Also the current equalization

lems of tank car under-compensation experienced by IHB and other railroads due to their excessive empty nonrevenue mileage.[6] Consequently, it ordered IHB and other undercompensated carriers to participate in the equalization rule. The decision also recognized that § 15(18) of the Interstate Commerce Act (the Act) (as amended by § 202(d) of the 4R Act) required the Commission to establish expeditious procedures for permitting publication of separate rates for distinct rail services. However, the decision concluded that, since repair movements are necessary to the movement of freight in all revenue service, switching for repairs could not be considered a distinct rail service.

Subsequent to the *Indiana Harbor* decision, the Commission decided several cases in which separate charges for private car repair moves were allowed, including one in which a concurring opinion describes the *Indiana Harbor* ruling as "bad law and bad policy" that should ultimately be overturned because it results in harmful cross subsidization and rate averaging.[7] Also, in *Indiana Harbor* the Commission did not fully consider the overall

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rule now includes for accounting purposes mileage caused by railroad error, railroad damage, railroad convenience, detours, and service orders.

The equalization rule does not apply to privately-owned covered hoppers and other non-tank cars. Covered hoppers are subject to a "back-to-back" rule, which currently provides that they are subject to a mileage charge of 32¢ per mile for the second of any consecutive empty line-haul movements.

[6] The Commission noted the need for an equalization rule or similar provision to spread the cost of empty repair movements for private cars, other than tank cars. Until such rule or provision was instituted, the Commission stated that IHB, if it accrued excess empty mileage, could bring a complaint against those carriers which it could identify as having received excess revenues and as being responsible for IHB's undercompensation.

[7] No. 38792, *Switching Charges for Privately Owned Cars Billed to Repair Facilities* (not printed), served October 18, 1982.

impact and direction of the then-recent 4R Act. Moreover, the subsequently enacted Staggers Act made even greater changes in the way railroads are regulated, including pronounced policy shifts away from cross subsidization and rate averaging.

Against that background, IHB decided in early 1983 to publish separate charges for empty repair movements not preceded or followed by a loaded revenue movement. Shortly after that, The Baltimore and Ohio Chicago Terminal Railroad Company (BOCT) did the same. Private car owners [8] filed complaints challenging these actions in No. 39380.[9] The Administrative Law Judge (ALJ) held for the defendants (IHB and BOCT) and found that the ruling in *Indiana Harbor* should no longer be applied because of subsequent legislative changes. The ALJ's decision was reversed by the Review Board by decision served June 13, 1984. The Board held that the case was governed by the decision in *Indiana Harbor* and that the collection of charges by defendants for the switching of empty privately-owned cars to facilities for cleaning, lining, relining, maintenance, modifications, or repairs was an unreasonable practice in violation of 49 U.S.C. §§ 10701(a) and 11121(a)(1). Complainants filed a petition for administrative review.

Because this proceeding raised serious questions about the continuing validity of the *Indiana Harbor* ruling, we issued a notice served October 9, 1984, and published at 49 Fed. Reg. 39,740 (1984) requesting comments and informing the public that we might modify or reverse

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[8] For convenience we shall use the term private car owners to refer to the entire scope of private car interests, including lessors, lessees, and shippers.

[9] Complainants in No. 39380 are General American Transportation Corporation (GATC), General Electric Rail Car Services Corporation (GE Rail), and Union Tank Car Company (Union Tank). (When the complaint was filed General Electric Rail Car Services Corporation was North American Car Corporation.)

the ruling in *Indiana Harbor* as conflicting with the revenue adequacy, rate flexibility, and car service provisions of the 4R Act and the Staggers Act. We reopened the record in *Indiana Harbor* so as not to foreclose any options in our consideration of the appeal in Docket No. 39380.

Pursuant to our notice, we received not only initial comments from a number of parties but also certain reply comments, verified statements, and motions to strike.[10] In order to consider all issues deemed pertinent by the various participants, we issued a further notice in which we denied the motions to strike, described a broad range of concerns we desired the participants to address, posed a number of questions, and solicited additional comments and reply comments.[11] Additional comments, and reply comments were filed.[12]

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[10] Comments were filed by The Baltimore and Ohio Chicago Terminal Railroad Company; Union Pacific Railroad Company and Missouri Pacific Railroad Company (jointly); Elgin, Joliet and Eastern Railway Company; Norfolk and Western Railway Company and Southern Railway Company (jointly); Consolidated Rail Corporation; LO Shippers Action Committee; Evans Products Company; Railway Progress Institute Committee on Tank Cars; Union Equity Co-operative Exchange; complainants in No. 39380; United States Steel Corporation; Trinity Industries Leasing Company; Interstate Railcar Service, Inc.; MBF Industries, Inc.; Mobil Oil Corporation; Phillips Petroleum Company; Pacific Molasses Company; Committee on Transportation and Distribution of The Society of the Plastics Industry, Inc.; and Chemical Manufacturers Association.

[11] Notice served March 15, 1985 and published in the *Federal Register* at 50 Fed. Reg. 10,867 (1985).

[12] Comments following this additional solicitation were filed by complainants in No. 39380; Railway Progress Institute Committee on Tank Cars; LO Shippers Action Committee; Phillips Petroleum Company; Indiana Harbor Belt Railroad Company; The Baltimore and Ohio Chicago Terminal Railroad Company; The Elgin, Joliet and Eastern Railway Company; The Kansas City Southern Rail-

PRELIMINARY MATTERS

In their petitions for administrative review, IHB and BOCT requested oral argument. Granting such requests is discretionary. *See* 49 C.F.R. § 1116.1(d). We conclude that oral argument is unnecessary to resolve the issues presented, and therefore deny IHB's and BOCT's requests.

Phillips Petroleum Company moves for leave to file its reply comments several days late. Acceptance of those comments will not prejudice any party. Accordingly, Phillips' motion is granted.

DISCUSSION AND CONCLUSIONS

The major issues that we will discuss are: (1) Is the *Indiana Harbor* rule currently working efficiently and equitably? (2) Is the *Indiana Harbor* rule lawful and in conformity with the legislative changes of the 4R Act and the Staggers Act? and (3) Alternative remedies to the *Indiana Harbor* rule.

A. *Is the Indiana Harbor rule currently working efficiently and equitably?*

As noted, the *Indiana Harbor* rule provides that movement of empty private rail cars to repair facilities is to be without charge when there is more than a *de minimis* economic benefit. We have reviewed the comments and find that the rule does not produce an efficient or equi-

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way Company; the Association of American Railroads; and the Eastern and Southern Railroads.

Reply comments were filed by complainants in No. 39380; LO Shippers Action Committee; Railcar Repair Association; Railway Progress Institute Committee on Tank Cars; Phillips Petroleum Company; The Baltimore and Ohio Chicago Terminal Railroad Company, the Association of American Railroads; and the Eastern and Southern Railroads.

table system of compensating rail carriers for repair moves.

In deciding to impose the *Indiana Harbor* rule, the Commission was aware of the difficulties of directly charging those carriers who benefited from the use of private cars for the empty repair movements. The Commission stated in *Indiana Harbor*, at 127, that:

> The need for such repairs of privately owned cars will usually arise as a result of use by many different carriers over a considerable period of time. Each such carrier is partially responsible for the need for repairs, and ideally the costs should be charged to each carrier accordingly. However, such an apportionment is impossible as a practical matter. The costs of moving "instrumentalities of transportation" must be compensated for in such a manner that no carrier which accrues a greater than average portion of these costs will be unduly burdened. Rather than costs for which precise compensation for particular services is possible, the costs of repair movements of privately owned cars must be treated as a common cost which must be shared by all carriers which derive revenue from the national private-car fleet. These "shared costs" must be compensated for as evenly as possible, for the absence of a comprehensive nationwide scheme to distribute the cost burden in proportion to the amount of economic benefit enjoyed by individual carriers from private car use would lead to a situation in which some carriers would be overcompensated while others would indeed be performing "free" transportation.

Recognizing the potential pitfalls in compensating carriers for repair movements, the decision concluded that the equalization plan was a workable solution, but clearly recognized that potential problems still remained to be ironed out.

The carriers in their comments have made it clear that under the *Indiana Harbor* rule the costs of the repair movements have unfairly been placed on certain railroads who make a disproportionate number of repair moves. Most often the railroads that bear the costs of repair movements are terminating roads. The effect is that these carriers are subsidizing other carriers who have benefitted from the use of loaded private cars. A carrier may not even have participated in loaded movements at all as to many of the cars it is called on to transport to repair sites. Yet, the *Indiana Harbor* rule sets only the *de minimis* benefit test.

These problems are particularly troublesome for IHB and BOCT. Both carriers have a number of repair shops on their lines. From 1978 through 1982, IHB switched 5,805 cars to repair shops and the same number from those facilities. If switching charges had applied, its revenues would have been approximately $856,452. However, during this period its recovery under the tank car equalization rule was only $96,263. Since it transported loaded cars in greater than *de minimis* quantities, it rightfully owed some contribution to repair move costs. While no precise calculations can be made, it is evident, however, that IHB bore repair move expenses greatly out of proportion to its own responsibility for them.

BOCT kept no records of repair moves prior to its tariff change that complainants challenge, but it estimates that it averaged 33 no-charge repair moves daily and considers its burden to be disproportionate.

Other carriers complain of disproportionate burdens. The major tank car facility on Kansas City Southern's lines is at Zwolle, LA. Most cars moving to Zwolle for repairs come from Beaumont, TX. That requires a 292-mile, round-trip movement at no charge. The nearest interchange point for repair ship movements is Shreveport, LA, 62 miles away. Union Pacific (UP) and Missouri Pacific (MP) estimate that together they are ab-

sorbing $850,000 annually by their inability to charge for repair shop movements.[13] In summary, it is evident, even without enough data to compute the exact extent of undercompensation that carriers such as IHB, BOCT, Kansas City Southern, UP, and MP face, that the *Indiana Harbor* method of handling repair movements results in substantial cross subsidization among carriers in general.

In *Indiana Harbor*, shipper interests argued that the 105% equalization rule formed a workable solution to the problems of carriers such as IHB, that carriers would be compensated for any excess empty repair mileage, and that an ongoing study and a rulemaking in Ex Parte No. 328 *Investigation of Tank Car Allowance System*, would afford an opportunity for correcting any problems.[14] *In-*

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[13] UP and MP also make passing reference to storage moves, and Kansas City Southern claims it is forced to store cars for free when private repair facilities are full. However, that issue is outside the scope of this proceeding.

[14] Complainants (private car owners) and their supporters now argue that the absence of expressions of dissatisfaction with the tank car equalization rule by rail carriers during the Ex Parte No. 328 renegotiations conducted under the reopening order in *Investigation of Tank Car Allowance System*, 367 I.C.C. 48 (1982) is evidence that undercompensation for repair moves is not a significant problem. They argue that, if the equalization rule is failing to result in a fair allocation of repair move expenses the rail carriers would have raised that issue in the negotiations.

The carriers respond, however, that, although there was limited discussion of repair moves, the railroads did not attempt to negotiate the issue because (1) the matter is in litigation in these proceedings; and (2) the railroads believe such expenses should be part of the mileage allowance system instead of the equalization rule. We take official notice that the renegotiated agreement submitted in Ex Parte No. 328 expressly provides that repair move expenses paid by tank car owners are to be included in the repair expenses data used in arriving at tank car mileage allowances. This in part explains the railroads" lack of need further to reconsider the equalization rule during the recent negotiations. Moreover, there are other aspects of the rules that were not agreed to and further study is ongoing.

diana Harbor, at page 120. Stating that a more developed record might lead to different conclusions, the Commission, as noted, decided that the 105% equalization rule reflected a more equitable approach to the allocation of responsibility for the repair-movement practical problem than any other solution proposed at that time. *Indiana Harbor*, at 128-129, 135, and 137.

We can now see, however, that, although IHB received some compensation under the equalization rule, it was not nearly enough, and the source of such funds was payment for the mileage in excess of 105% (now 106%) that was mainly designed to represent shipper-responsibility, empty operations such as transfers. The equalization rule does not deal with intracarrier allocation of repair movements although they ostensibly were to be compensated adequately by the 5% element. Yet that is where the main misallocation lies. As noted, the railroad industry overall is responsible for the costs of ordinary repairs to private cars that carriers use in their loaded operations, but, as demonstated earlier, there is no necessary relationship between each carrier's share of repair move responsibility in terms of loaded revenue miles and its participation in repair move operations. Since the equalization rule does not deal with that problem, then *a fortiori* it cannot prevent misallocation and cross subsidization. Some other solution is therefore needed.

B. *Is the Indiana Harbor rule lawful and in conformity with the legislative changes of the 4R Act and the Staggers Act?*

Prior to our discussion of a solution to the repair movement problem, we will re-examine the "instrumentalities of transportation" and "distinct rail services" prinicples as applied in *Indiana Harbor.*

1. *The instrumentality of transportation issue.*

A basic foundation upon which *Indiana Harbor* was decided was the application of the "instrumentality of

transportation" principle. We must re-examine it to see whether it was and still is sound or legally required.

The 1947 *Union Tank* decision, *supra*, reversed a Division opinion that switching empty tank cars for repairs is transportation of "property" for which charges should be assessed. Although the cars are "property" within the broad meaning of the term, *Union Tank* states that, when they are in use as instrumentalities of transportation, whether owned by a carrier or a private owner, they are not "property" within the meaning of then § 6(7) of the Act. The decision held that such cars do not lose their instrumentality of transportation status when taken out of service temporarily, and, accordingly, that they are not subject to charges for line-haul movements or switching movements within terminals.

The Commission went on to state that the question of whether the mileage allowance includes the cost of repair switching has no important bearing on the issue. The evidence in that proceeding indicated that allowances were determined with the understanding that repair switching would be done without charge and those costs would not be included within the allowance, but the decision says that, if the repair switching costs were included in the allowance, the proper remedy would lie in readjustment of the mileage allowance and continuance of the practice of switching without charge.[15]

The *Union Tank* approach, however, was established in an era when rate averaging and cross subsidy were

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[15] As a dissenting opinion noted: (1) in *Use of Private Passenger Train Cars*, 155 I.C.C. 775, 786 (1929), the Commission said that charging for repair moves was acceptable; and (2) in *Sioux City Term. Ry. Switching*, 241 I.C.C. 53 (1940) the Commission stated that mileage allowances were supposed to cover all costs of supplying private cars, including repair move switching costs. Union Tank did not expressly overrule those cases, but its treatment of empty repair movements has been the standard since then.

commonplace, often encouraged and clearly deemed acceptable. Indeed, prior decisions in *Indiana Harbor* take a similar approach by adopting a nationwide, averaging solution. The 4R Act's legislative history notes that a cross subsidization policy had been part of public transportation since the beginning of Commission regulation, but that that policy should be changed.[16]

Union Tank reached its conclusion without detailed analysis. Instrumentalities of transportation are by definition equipment whose costs are a responsibility of railroads because such equipment enables them to meet their common carrier obligations. The key to understanding the *Union Tank* holding is knowing that the customary way of handling such matters then was through collective responsibility. In that setting, it was rational simply to treat "instrumentalities of transportation" as a category for which charging was improper. Now, however, a closer look at the situation is required.

Section 6(7) and its successor section forbid carriers from transporting passengers or property unless rates and regulations are filed and published in accordance with other parts of the Act. However, the former § 6(7) mandate does not prohibit the collection of charges.[17] It merely requires that rates be published in tariffs before chargeable transportation operations are performed. That leaves unaddressed the question of the lawfulness or unlawfulness of initially collecting charges on instrumentalities of transportation pending final railroad settlement of responsibility through the mileage allowance mechanism. Thus, even when it was decided, *Union Tank* did not reflect a thorough legal analysis.

No other statutory section supports the *Union Tank* instrumentality of transportation approach. Section 10747 provides that a railroad may publish in a tariff "a

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[16] S. Rep. No. 499, 94th Cong. 1st Sess., at 11 (1975).

[17] A review board reached this same concluusion in *Midwest Freight Car Co.—Declaratory Order*, 358 I.C.C. 462, 470 (1977).

charge or allowance for transportation or service for property when its owner, directly or indirectly, furnishes a service related to or an instrumentality used in the transportation or service," and that the Commission may prescribe the maximum reasonable charge or allowance. That language does not prohibit carriers from initially charging for repair moves and then letting the car owners recover those expenses in proper proportion through, for example, mileage allowance payments from carriers using private cars in loaded moves. Section 11122, likewise, does not prohibit carriers from initially charging for repair moves with subsequent recovery by car owners.

The statutory scheme for paying for private cars is based upon the payment of allowances by carriers to car owners. No statutory requirement would be violated if private car owners initially pay repair move costs and then are reimbursed for those expenses through the allowance system. We conclude that *Union Tank's* method of handling repair moves does not presuppose a statutory bar to charging initially for them.

2. *The distinct rail service issue.*

Section 202(d) of the 4R Act amended what is now 49 U.S.C. § 10728 to require that the Commission establish expeditious procedures for permitting publication of separate rates for distinct rail services. In a rulemaking proceeding to implement that directive, the Commission defined distinct rail services as "those railroad transportation services, which are separate from line-haul transportation services necessary for the movement of freight, and for which a specific tariff item is published * * *." *Procedures for Publication of Separate Rates*, 355 I.C.C. 684 (1977) (*Procedures*).[18] *Indiana Harbor* concluded that, since repair movements are necessary to the movement of freight in revenue service, switching for repairs cannot be considered a distinct rail service.

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[18] The regulations are now codified at 49 C.F.R. § 1137.2.

Defendants contend that switching is distinct and separate from line-haul moves. IHB argues that the phrase "necessary for the movement of freight" refers to the nature of the service rather than its purpose. BOCT refers to dictum in a review board decision, No. 38646, *Inland Steel Company v. Illinois Central Gulf Railroad Company* (not printed), served May 24, 1982. The board said that repair moves at issue in that proceeding were a distinct service, but it acknowledged that reaching that issue was not a prerequisite to disposition of the proceeding.

Complainants (private car owners) and their supporters argue: (1) that the Commission is bound by the regulations defining distinct rail services unless they are changed in a reopened rulemaking proceeding; (2) that § 10728 was not changed by the Staggers Act; and (3) that the conclusion in *Indiana Harbor* on this issue is correct and must be followed because it was affirmed on judicial review and also was followed in another court decision, *Evans Products Co. v. ICC*, 729 F.2d 1107, 1109 (7th Cir. 1984).[19]

Separate charges for distinct rail services were permissible under § 6(1) of the Act prior to the 4R Act's amendments (*Procedures, supra*, at 690) and the purpose of the 4R Act's changes was to "promote" separate pricing of distinct rail and rail-related services as part of an overall emphasis on fostering competition.[20] Moreover, the Commission emphasized that a purpose of the regulations was explicitly to state its policy of encouraging the separate publication of distinct rail service rates. *Procedures, supra*, at 690.

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[19] Complainants also contend that, in light of the notoriety of the distinct rail service holding in *Indiana Harbor* and the comprehensiveness of the Staggers Act, the fact that Congress did not choose to amend § 10728 is an indication that it endorsed the continued validity of *Indiana Harbor*.

[20] Section 10728 itself uses the word "promote."

The definition that was initially proposed specifically stated that distinct rail services embraces, but was not limited to, switching and 16 other services. The Commission, however, decided: (1) to use a general definition; (2) to include the phrase "which are separate from line-haul transportation services necessary for the movement of freight" to avoid separate rates leading to a detrimental breakdown of existing line-haul rates; and (3) to make individual determinations on a case-by-case basis. *Procedures, supra,* at 696, 697, and 698, respectively.

Operationally, switching for repairs clearly is distinct from line-haul service, but it is also true that repair movements are necessary for the movement of freight in line-haul service. Line-haul transportation cannot be performed without the use of rail cars, and rail cars cannot be operated over their useful lifespans without periodic maintenance. Thus, this issue is not as simple as considering the separate operational nature of the service alone.

On the other hand, we demonstrate in this decision that the present method of handling repair moves results in harmful cross subsidization that is contrary to the aims of the 4R Act, the Staggers Act, § 10728 (which was intended to promote individual market pricing of different aspects of service) and that the various proposals for making intra carrier adjustments are not reasonably feasible. In light of that we cannot, without further analysis, let the *Indiana Harbor* distinct rail ruling (with its lack of supporting discussion or logic) bar corrective action that is now shown to be needed.

Since the purpose of the "necessary for the movement of freight" language in the regulations was to avoid a detrimental breakdown of line-haul rates, it is appropriate to examine the effect on line-haul rates of a changeover to a system of initial charging for repair moves. Unless that changeover would cause a line-haul rate problem, such separate rates should be promoted.

The revised system, as will be explained, will simply result in different methods of accounting for the repair cost element of private car owners' expenses. In the end, the railroads as an industry bear those expenses under either method, so they would need to consider that aspect along with other factors in setting their rates for loaded movements. Under the *Indiana Harbor* method, the railroads bear the costs of repair expenses other than repair moves by making payments to car owners, and they collectively bear the expenses of repair moves by not charging car owners for that service in the first place. Under a method that would let the railroads charge for repair moves, the car owners may recover those expenses through the mileage allowance system in the same way that they recover other car repair costs. Thus, the difference is in the mechanics of the process the railroads follow in bearing those expenses, rather than in the final result. While retaining ultimate compensation for car owners, the latter method would avoid a disproportionate burden of repair moves among certain carriers.

Consideration of repair move expenses in the line-haul rate is thus not affected by the repair move method used, except possibly to the extent that a particular carrier's significant overburden or underburden under the old system would be reflected in its rate structure. In that case, removal of the cross subsidization factors would have a favorable effect on the existing rate structure rather than cause a detrimental breakdown. The policy of promoting separate charges for distinct services to foster competition outweighs any claimed interest in keeping intact a system that rewards and punishes without relationship to individual costs or revenues.

Accordingly, consistent with the distinct rail service general definition, and as a result of using the implementing rules' case-by-case approach to apply them to specific circumstances, we conclude that the provisions of § 10728 and our implementing rules at 49 C.F.R. § 1137.2 do not bar the adjustment we find necesary in this decision in

the method of handling the costs of moving private cars for ordinary repairs.

3. *Legislative Changes*

We have in earlier decisions found that reconsidering the *Indiana Harbor* decision in light of the significant changes in the Commission's regulation of railroads resulting from the 4R Act and Staggers Act is necessary. The 4R Act provided, among other things, for: separate rates for distinct rail services (§ 202); standards and procedures for establishment of adequate revenue levels (§ 205); a 7% "zone of reasonableness" within which the ICC could not suspend a proposed rate while investigating the proposal (§ 202); and a narrower scope of review of railroad ratemaking generally (§ 202).

The Congress in the Staggers Act mandated the Commission to allow railroads even greater flexibility in setting rates. The Staggers Act encouraged the establishment of demand sensitive rates (§ 217), and greater rate flexibility (§§ 202 and 203).

The new Rail Transportation Policy in the Staggers Act provides that the United States Government shall "allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail" [49 U.S.C. § 10101a(1)]; "promote a safe and efficient rail transporation system by allowing rail carriers to earn adequate revenues" [49 U.S.C. § 10101a(3)]; and "encourage honest and efficient management of railroads, and, in particular, the elimination of noncompensatory rates" [49 U.S.C. § 10101a (10)].

The rationale of *Indiana Harbor* is in direct conflict with Congressional direction in the statutory provisions of the 4R Act and the Staggers Act. Specifically, the *Indiana Harbor* decision's method of compensation for cars moving empty in repair moves is directly contrary

to current statutory provisions that require the Commission to encourage efficient pricing and provide all carriers with a realistic opportunity to earn adequate revenues. 49 U.S.C. §§ 10701a(b)(3), and 10704(a)(2).

Furthermore, the *Indiana Harbor* approach is also inconsistent with current statutory requirements because it requires carriers to establish rates or free movements which do not contribute to going concern value [49 U.S.C. § 10701a(c)], prohibits individual pricing for distinct services [49 U.S.C. § 10728], encourages cross-subsidization [49 U.S.C. §§ 10101a(10), 10707a(e)(2)], and promotes inefficiency by giving private car owners little or no incentive to consider transportation costs in selecting repair facilities [49 U.S.C. § 10101a(1), (4), (10)].

C. Alternative remedies to the Indiana Harbor rule.[21]

1. *Complainants' proposed solutions.*

Complainants (private car owners) contend that IHB's and BOCT's undercompensation results from the refusal of their connecting carriers to pay them an adequate switching allowance out of the line-haul rates. However, since the problem is caused by the lack of proportionality among carriers with regard to loaded movement and repair movement participation, increasing divisions of reve-

[21] Although we requested comments on market dominance jurisdictional threshold applicability and repair move rate reasonableness levels, there is widespread agreement among the parties that those matters are not formally at issue here. We agree, because complainants in No. 39380 do not challenge the reasonableness of the level of repair move rates that IHB and BOCT published. Instead they question those carriers' right to make any charge by departing from Indiana Harbor's system of collective carrier responsibility that is implemented by simply not charging for repair moves. Market dominance and rate reasonableness issues that may arise in the future regarding charges for repair moves can be addressed in the same way they are addressed for rates in general.

nue on loaded movements will not remove misallocation of repair movement costs.[22] *Indiana Harbor*, at 126, noted that in an earlier proceeding the Commission had "assumed" that any inequality in revenue empty repair-movement mileage would be corrected by divisions of revenue. However, *Indiana Harbor* itself, at 131, found division of revenue adjustments to be an inappropriate way to solve the disproportionate repair movement problem.

Complainants also note that IHB and BOCT are owned by other carriers and argue that the Commission should find that IHB and BOCT recover their empty repair switching costs through their owners' participation in line-haul rates on commodities transported in private cars. Since disproportionate repair moves is a general problem not limited to IHB and BOCT, that argument would not suffice even if it were acceptable. Other carriers, including the parent railroads, may be overburdened or underburdened by repair movements since the relationship to loaded movements is left to chance. In any event, we agree with the conclusion in *Indiana Harbor*, at 127, that the Commission should not "pierce the corporate veil" unless there is strong evidence that the corporate form is being ignored and abused.[23] There is no proof that such a situation exists in this proceeding.

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[22] As we have described, repair movement carriers sometimes may not have participated at all in the loaded movements that led to the need for repairs. There would be no opportunity to correct the situation by the allocation of revenue from loaded movements in that situation. Nor need a percentage payment based on loaded miles (i.e., the equalization formula) fairly compensate a carrier, as the number of repair shops on its line will have no relation to its participation in revenue hauls.

[23] A similar conclusion in No. 38792, *Switching Charges for Privately-Owned Cars Billed to Repair Facilities* (not printed), served October 18, 1982, was affirmed on judicial review in *Evans Products Co. v. I.*, 729 F.2d 1107, 1110 (7th Cir. 1984).

Another suggestion by complainants (following up on *Indiana Harbor's* suggestion to this effect) is that IHB and BOCT file complaints against carriers they can identify that received excess revenues and are responsible for IHB's or BOCT's undercompensation. We must conclude, based on the lack of any such complaints since *Indiana Harbor* was decided, that this was never a realistic option. Moreover, undercompensated carriers lack the data necessary to file complaints against overcompensated carriers. Obtaining it through discovery would be complex, costly, and impractical. For example, determining which carriers over a period of time and many miles of operation had transported a particular car in loaded operations leading up to a particular repair move might by itself be very complex and it likely would be economically unjustifiable. The overall problem involves cumulative effects of many patterns of specific operations and thus is much broader in scope than that.

Moreover, even if a pattern of certain loaded movements and repair movements with some cars would be readily identified and the imbalance between the two types of movements determined, the "overcompensated" carrier would not necessarily reasonably owe the "undercompensated" carrier anything because only isolated studies would have been made and the former carrier's "overcompensation" on such specific traffic might not reflect its overall position. Furthermore, the complaint-filing approach reflects expectation of a remedy only in the more extreme cases, but the cross subsidy problem is a general one. Accordingly, complaint filing is not a satisfactory solution.

The remaining alternative that complainants and their supporters suggest is the pooling of the repair-movement cost element in line-haul rates for distribution among repair-movement carriers according to their relative participation. They suggest that the details of such an ar-

rangement would be an appropriate subject for a future rulemaking proceeding.

Although this pooling suggestion was one of the "Possible Remedies" discussion topics in our March 15, 1985, decision that authorized the filing of additional comments and replies by all interested persons, little was said by the parties about it. The Eastern and Southern Railroads argue that this approach includes a premise that line-haul rates include a discrete cost element, and that the premise is erroneous because rates are set by market forces instead of by mechanically computing costs.

No conclusion can be made on this record that the suggested pooling solution is viable. Because so many opportunities have already been provided for commenting on the repair-movement issue, it would be unreasonable further to delay final consideration of this matter pending institution of another proceeding. In any event, we believe there is a simpler alternative, as the following discussion explains.

2. *Repair-movement charging, with a passback through mileage allowances.*

The railroads argue that the present convoluted system is unneeded because repair costs could be recovered through the mileage allowance system in the same manner other private cars are recovered. We agree. Allowing carriers that transport private cars to repair shops to charge initially for those movements would avoid the cross subsidy now experienced.

This method appears to be the most efficient, fair, and least disruptive way of handling the matter. There would be no need to establish a second elaborate system of allocating repair movement responsibility among individual carriers because mileage allowance systems are already in place for handling other private car repair and car supply costs, and repair movement costs could be treated

the same way. This approach follows basic business practice, whereby each production process participant is paid directly for his goods and services and all such costs are combined to determine the overall production expense. As our discussion above shows, the alternatives supported by private car owners are not suitable, effective substitutes.

Although some railroad contentions at earlier stages seem to be to the contrary, the Association of American Railroads (AAR), and virtually every carrier that filed comments in response to the March 15, 1985, reopening order acknowledge that, if charges for repair moves are made, the car owners may pass them back to the railroads as repair expense elements in mileage allowance computations. Union Pacific Railroad Company suggested the use of that method to remedy the problems caused by the existing situation.

Private car owners contend that allowing carriers to charge for repair moves would result in double payment because line-haul rates already reflect car supply costs. Line-haul rates frequently are set at levels determined by competitive factors without necessarily tracking all costs closely. Nonetheless, carriers' use of private cars in performing their operations obligates them to compensate car owners. The carriers' recognition that private car repair move expenses, if paid by car owners, are properly included as repair expenses in mileage allowances, addresses private car owners' double payment contentions. This proceeding's proper remedial focus is on a mechanism for proper allocation of railroad private car repair expenses without either "free" transportation or double compensation. Individual rates for repair moves will be subject to review under § 10701a.

The private car owners argue: (1) that they would not be made whole if the system were changed because mileage allowance "caps" imposed by carriers prevent recovery of car ownership costs; (2) that the railroads

argue that cost recovery should be through allowances, yet they seek to avoid full costs recovery in favor of demand-based payment; and (3) that this proceeding would not deal with these inequities directly or effectively.

Mileage caps are deviations from negotiated mileage formulas. Caps set an upper limit on the mileage allowance a railroad will pay. That limit is below the amount that would result if the carrier adhered to the negotiated formula. However, the Commission is examining caps in other proceedings, such as No. 39909, *Cap on Mileage Allowances for use of Privately Owned Tank Cars, SP.* Where a cap has not been justified, the Commission has ordered it withdrawn. *See* No. 39908, *Mileage Allowances for Covered Hoppers, Grain & Grain Products, BN* (not printed), served December 5, 1985. In the future, a mileage cap may or may not be reasonable, depending, on the circumstances. The renegotiated tank car agreement in *Investigation of Tank Car Allowance System* 3 I.C.C.2d 196 (1986), authorizes caps in special circumstances, yet provides for automatic investigation of tank car mileage allowance caps when requested by an affected party. The cap issue, which involves mileage allowances overall, not just the repair movement aspect, belongs in such other proceedings.

The same is true of the issue of the effect of changes in supply and demand on the level of mileage allowances. The prior tank car allowance formula was renegotiated because it failed adequately to account for the effects of supply and demand. However, the parties agreed on formula changes that we have now approved. The new tank car agreement increases allowances during periods of car shortage and decreases them during periods of car surplus. This approved agreement thus covers the supply and demand issue regarding tank cars.

In relation to covered hoppers, we are affirming in No. 39117, *Lo Shippers Action Committee v. Aberdeen and*

Rockfish Railroad Company, et al.[24] that ownership cost is not the only factor we must consider in evaluating car compensation under 49 U.S.C. § 11122. Other statutory considerations, such as efficiency of car use and the national level of car ownership may justify payment of allowances that do not fully cover ownership cost when the supply of cars greatly exceeds the demand. However, the fact that car allowances do not fully insulate car owners from adverse market conditions does not change the fact that the railroads' contribution to coverage of private car ownership costs should come directly through allowances rather than indirectly through devices such as uncompensated repair moves that constitute inefficient and inequitable cross subsidies.

Another argument car owners make is that initial charging and then recovery through allowances will transfer the averaging problem from the railroads to them. The Railway Progress Institute, Committee on Tank Cars, notes that cost data used in determining tank car allowances are furnished only by four tank car companies, not by owners of the entire fleet, because many shipper-owners are unable to furnish the required data. Those four major tank car companies comprise the Committee on Tank Cars making this argument. Other owners supply cars under such circumstances by their own choice. They could seek to participate in the data input process if they chose.

Moreover, to the extent that any private car supplier has higher than average repair movement expenses it has an incentive to find ways to reduce those costs by becoming more efficient. That is consistent with sound economic principles. The method used for supplying data is an already existing one for allowances overall, and not unique to repair movements.

We conclude that allowing carriers initially to charge for repair movement services and permitting carriers and

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[24] Open Voting Conference held February 24, 1987.

private car owners to treat those expenses just like other repair expenses recoverable through the mileage allowance system appears the most appropriate solution suggested in this proceeding. While we do not require it, we commend it to the parties for consideration.

D. *Other issues*

Complainants in No. 39380 contend that the 1977 *Indiana Harbor* decision is *res judicata* of their complaint against defendant IHB and has a similar preclusive effect against BOCT even though that railroad was not a party to the 1977 proceeding. They argue that, whether or not the principle of *Indiana Harbor* should be overturned for the future, the Commission cannot fail to apply that principle in the present and past.[25]

Res judicata rests on the principle that a controversy should only have to be resolved once. It applies to administrative determinations when the agency is acting in a judicial capacity and resolves disputed issues of fact properly before it that the parties have had an adequate opportunity to litigate. *United States v. Utah Constr.*, 384 U.S. 394, 421-422 (1966); 4 *Davis, Administrative Law Treatise*, § 21:2 at 49-51 (2d ed. 1983).

However, because the factual issues resolved in the prior proceeding involved private car repair movements in the early 1970's and we are now dealing with such movements made since early 1983, *res judicata's* protection against relitigation of the same claim or cause of action does not apply even to IHB, which was a party to the earlier proceeding. The claim or cause of action is different. *Davis, supra*, at 59, for example, notes that "a classification of imports is *res judicata* only with respect to the same merchandise, not with respect to later merchandise, even if the questions of law and fact are the same," citing *U.S. v. Stone & Downer Co.*, 274 U.S. 225 (1927).

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[25] Complainants characterize the reopened No. 35404 portion of these proceedings as a "rulemaking (legislative) portion."

In a broader sense, though, *res judicata* includes collateral estoppel, sometimes called issue preclusion, which potentially applies here because the factual setting is very similar to the situation covered by the 1977 decision.

However, "[collateral estoppel] is not meant to create vested rights in decisions that have become obsolete or erroneous with time * * *." *Commissioner v. Sunnen*, 333 U.S. 591, 599 (1948). "*Res judicata* should not prevent an agency, after a decent interval, from testing the question whether law or policy concerning continuing practices may have changed." *Davis, supra*, at 60. "A determination that a continuous practice is lawful for one period of time is not necessarily *res judicata* for a later period of time." *Davis, supra*, at 60, citing *FTC v. Raladam Co.*, 316 U.S. 149 (1942). *Davis, supra*, at 51, also notes that the second Restatement of Judgments (1982), in § 83, recognizes the applicability of *res judicata* to administrative determinations but that there are exceptions, including one that "protects against *res judicata* when it 'would be incompatible with a legislative policy.'" Finally, the Supreme Court has stated that:

> [T]he [Interstate Commerce] Commission, faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practices. * * * [T]his kind of flexibility and adaptability to changing needs and patterns of transportation is an essential part of the office of a regulatory agency. Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices * * *.

American Trucking v. *A. T. & S. F. R. Co.*, 387 U.S. 397, 416 (1967).

Thus, the principles on which complainants rely do not result in an absolute bar against reassessing as to IHB and BOCT the way empty repair move compensation is handled. Changes in circumstances since the prior decision was issued have to be considered. Clearly there was a "decent interval" between the 1977 decision and the time in 1983 when IHB and BOCT changed their tariffs. Moreover, the *Indiana Harbor* decision itself contains statements reflecting uncertainty and noted that "potential problems still may remain to be ironed out." 357 I.C.C. 102, at 135. It recognized that the problem of excessive, empty nonrevenue mileage is preplexing and stated that the equalization rule "appears" to be a workable, equitable solution. *Id.* It also noted that "a more developed record might lead to different conclusions." *Id.*, at 128.

In addition, as we noted above, the Commission did not fully consider the overall impact and direction of the then recent 4R Act; and the Staggers Act has made even greater changes in the way railroads are regulated. Cross subsidization is a crucial issue in this proceeding. Since the 1977 decision was issued, there has been a pronounced shift away from a regulatory climate that accepts such effects.

Complainants argue that the changes we are now considering involve the exercise of a legislative, or rulemaking, function, and, accordingly, that any changes should apply only prospectively. The question in No. 39380 thus is whether the change we are adopting should apply retroactively.

Davis, supra, at 43, states that "retroactive overrulings that seem to be a part of the normal growth and development of law are not only tolerated *but are very common.*" (Emphasis added.) That treatise also notes, at 24, that "The technique that seems to be in the ascendancy is to limit an overruling to prospective effect but to ap-

ply the overruling retroactively in the overruling case." It likewise notes, at 23, that "The main guide for what agencies should do about retroactive overruling is what courts do." In *Bradley v. Richmond School Board*, 416 U.S. 696, 711 (1974), the Supreme Court stated the principle that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary."

Nothing in the Staggers Act or its legislative history prohibits retroactively applying in No. 39380 the change we approve in this decision. Indeed, the policies of the Staggers Act encourage the tariff changes that IHB and BOCT made. In respect to No. 39380, our review is limited to the lawfulness of the tariffs and, given our findings in regard to the validity of *Indiana Harbor*, we find that the complained of tariffs are lawful.

We further conclude that there is no manifest injustice in finding those repair movement charges lawful. IHB's and BOTC's burden under the present system is very disproportionate. By the time they made the tariff changes challenged, major changes in regulatory policy had taken place that emphasized individual carrier freedom and disapproved of collective approaches which result in averaging or cross subsidization. The 1977 decision had been questioned in other Commission decisions. Overruling the 1977 decision is a normal development in this Commission's regulatory role, rather than an unfair, unexpected, and sudden change.

Moreover, the record shows, in fact, that such charges are already being included in the mileage allowance computation data with regard to tank car repair moves. A witness for the Railway Progress Institute acknowledges that the updating of allowances for September 1, 1984, and September 1, 1985, did include some charges for empty repair moves. A witness for the AAR testified

that: (1) in the Ex Parte No. 328 renegotiations a subcommittee unanimously agreed in February 1984 that when repair move charges are assessed they are part of overall repair costs in the mileage allowance formula; (2) that several leasing company representatives said they were presently including such expenses in the annual cost of ownership study; and (3) that this information was conveyed to the joint negotiating committee and was received without objection.

In its November 1984 comments, Chemical Manufacturers Association contended that, if *Indiana Harbor* is overruled, and carriers are allowed to charge for repair movements, that such charging should not begin until an improved mechanism is in place to implement the changeover. It made that argument because the 1979 tank car agreement averages maintenance costs over a three-year period and it would take four years for allowance payments to offest newly-imposed repair costs. That matter has been mooted, however, by subsequent changes in the tank car agreement. The renegotiated agreement filed July 1, 1985, makes specific changes from three-year averages to 12-month updates on maintenance cost data and expressly states that repair movement charges shall be included in such data.[26]

We recognize that, for the changeover we are approving to be fully effective, there will have to be a change in the mileage equalization rule. The carriers and private car interest in Ex Parte No. 328 already plan to restudy the 106% equalization ratio and the mileage charge to determine whether charges are needed. It is inappropriate for us to change the equalization rule in this case. Accordingly, at this point we will leave the matter to the parties in interest.

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[26] *See* the last sentence of § 3(a) of the revised agreement in the appendix to *Investigation of Tank Car Allowance System.* 3 I.C.C. 2d 196 (1986).

Finally, we note that, while the discussion in this proceeding focused on tank cars, it was because the evidence presented tended to reflect the tank car experience. The vast majority of privately owned cars are tank cars and covered hoppers. This decision, however, applies equally to all types of private car repair moves and the problems and changes discussed in respect to tank cars also have general application to other car types.

This action will not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. Railroads may charge initially for moving private cars to and from repair shops.

2. The complaint in No. 39380 is dismissed and complainants' petition for reparations is denied.

3. These proceedings are discontinued.

4. This decision is effective April 13, 1987.

By the Commission, Chairman Gradison, Vice Chairman Lamboley, Commissioners Sterrett, Andre, and Simmons, Vice Chairman Lamboley dissented.

APPENDIX F

INTERSTATE COMMERCE COMMISSION

DECISION

No. 35404 [1]

GENERAL AMERICAN TRANSP. CORP.

v.

INDIANA HARBOR BELT RAILROAD CO.

Decided: February 22, 1988

By a petition filed April 1, 1987, The Railway Progress Institute Committee on Tank Cars (RPI) seeks reopening and reconsideration, based on allegations of material error, of our prior decision, 3 I.C.C.2d 599 (1987). The decision announced a change in policy to permit railroads, regardless of the carrier's degree of participation in related revenue movements, to charge for the movements of privately owned cars to and from private facilities for ordinary maintenance and repair. By a letter petition filed April 13, 1987, American Petroleum Institute (API) also seeks reopening and reconsideration. Phillips Petroleum Company (Phillips Petroleum) and the Chemical Manufacturers Association (CMA) filed reply comments in support of RPI's petition. The Baltimore and Ohio

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[1] This decision embraces No. 39380, *General American Transp. Corp. et al. v. Baltimore and Ohio Chicago Terminal Railroad Co., et al.* (No. 39380).

Chicago Terminal Railroad Company (BOCT) and Indiana Harbor Belt Railroad Company (IHB) (jointly) and the Association of American Railroads (AAR) filed replies in opposition.[2]

BACKGROUND

This proceeding began as a complaint in No. 39380 against tariff charges for private car repair moves by IHB and BOCT. An Administrative Law Judge ruled in favor of defendants. A review board reversed, holding that the decision in *General American Transp. Corp. v. Indiana Harbor*, 357 I.C.C. 102 (1977) (*Indiana Harbor I*), precluded such charges. In our March 12, 1987, decision (*Indiana Harbor II*), we overruled *Indiana Harbor I*. We had previously published a notice that we were re-examining the policy of *Indiana Harbor I*, and extensive comments were filed by interested parties.

Indiana Harbor I forbade the railroads (with certain exceptions) from imposing tariff charges for movements of private cars to and from repair facilities. The rule was based upon the railroads' overall obligation to supply equipment and the derivative principle that private cars, when put into service, become instrumentalities of transportation, and their movement for repairs becomes the collective responsibility of the rail industry. In *Indiana Harbor II*, we rejected that premise. We found that the policy against individual carriers charging for movements of private cars to repair facilities resulted in serious misallocation of economic burdens among carriers and

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[2] By joint petition filed July 24, 1987, RPI, CMA, and the AAR requested that a decision on the petition to reopen be deferred pending negotiations among railroads and private car owners on changes to the mileage allowance formula, the equalization rules, or other related matters, in light of the Commission's decision in this proceeding. However, they later concluded that there was no present need to negotiate, and on September 2, 1987, withdrew their joint petition to defer action.

conflicted with Congressional mandates. We considered various alternatives, and concluded that the most appropriate way of handling the matter was to allow rail carriers to charge for these movements. We suggested, but did not require, that private car owners could use the mileage allowance system to obtain appropriate compensation for the repair movement costs they incur, just as they do to recover other private car repair and car supply costs.

DISCUSSION AND CONCLUSIONS

RPI argues generally that, under the system announced in *Indiana Harbor II*, the car owners will ultimately bear at least some of the cost of repair moves. It claims this violates both the law and Commission policy. It argues this violates both the law and Commission policy. It argues that only complete reimbursement, which cannot be assured through mileage allowances, will be in accordance with the law. RPI further contends that the Commission essentially disregarded all difficulties with recovery through the mileage allowance system by noting that it commends, but does not require, recovery through that system.

We disagree. In *Indiana Harbor II*, while we did not reject the railroads' overall responsibility for repair movements, we did reject the prevailing *means* of compensation: an outmoded, impractical, and irrational prohibition against tariff charges for repair movements charges based upon the theory that private cars were instrumentalities of transportation. Instead, we recognized that, in moving cars for repairs, the railroad is performing a distinct rail service for which a tariff charge should be made under the provisions of 49 U.S.C. 10728 and 49 CFR 1137.2 *et seq.*

The railroads' obligation to compensate car owners for costs of ownership including repair movements still exists, but the most plausible statutory basis for discharging that obligation within the regulatory framework of pub-

lished rates is section 11122, which governs private car compensation generally. That section, as we discussed in *Indiana Harbor II*, requires that private car compensation reflect not only costs of ownership, but the sometimes conflicting considerations of the national level of car ownership and other non-cost factors that affect the supply and efficient use of cars. Slip op. at 14-15. Thus, it does guarantee that individual car owners will receive their overall costs of ownership, let alone dollar for dollar reimbursement of one specific element of ownership costs: repair moves. *See Lo Shippers v. Aberdeen & Rockfish Ry Co., et al.*, 4 I. C.C.2d 1 (1987); and *Car Service Compensation—Basic Per Diem Charges*, 1 I.C.C. 2d 742 (1985).

It is true that we commended, rather than required, car owners to seek recompense through mileage allowances. However, this was simply an acknowledgement that the primary issue in this proceeding is the lawfulness of tariff charges for repair moves, rather than the suitability of alternatives open to car owners for recouping those costs. Nevertheless, we thoroughly considered and discussed all objections to the tariff charge-mileage allowance passback approach, as well as all suggested alternatives to that approach offered by complainants.

RPI argues that we did not consider the effect of *Indiana Harbor II* upon contract rates, and of lessor/lessee agreements made in reliance on *Indiana Harbor I*. Phillips Petroleum raises the same issue. Contracts and lease agreements were not discussed, for the simple reason that no party raised the issue. Our failure to discuss something that the parties could have made part of the record, but did not, is not material error. *ICC v. Parker*, 326 U.S. 60, 73-74 (1945).

However, a fundamental legal principle controls: voluntary private contracts cannot bind Congress or this Commission to maintenance of the regulatory status quo. RPI's contention that parties entering into transportation

contracts and car leases have an incontrovertible right to rely continually on the legal principle established in *Indiana Harbor I* is equivalent to the *res judicata* and collateral estoppel arguments that were made, thoroughly discussed, and rejected in *Indiana Harbor II*, at 616-617.

Furthermore, RPI does not have a constitutional right to a regulatory guarantee that it will be free of future regulatory acts that may affect the fortunes of its business. When parties negotiate under an existing regulatory scheme they do so at their own risk. That scheme may later be affected by regulatory reform. The fact that such reform may change the basis of past and present contractual relationships cannot be a bar to the normal evolution of the regulatory process. *See, e.g., Exemption from Regulation—Boxcar Traffic*, 367 I.C.C. 747, 771-772 (1983), *reversed on other grounds, Brae Corporation, et al.* v. *ICC & USA*, 740 F.2d 1023 (D.C. Cir. 1984) *cert. denied*, 471 U.S. 1069 (1984). *See also American Airlines v. CAB*, 445 F.2d 891, 896 (2d Cir. 1971), *cert. denied* 404 U.S. 1015 (1972). We find RPI's position here particularly unpersuasive inasmuch as it had sufficient notice of the fact that *IHB I* was becoming increasingly out of step with the prevailing regulatory and industry environment. Post *IHB I* decisions began clearly to regard *IHB I* as "bad law and policy" signaling that a change was imminent. *See* No. 38792, *Switching Charges for Privately Owned Cars Billed to Repair Facilities* (not printed), served October 18, 1982, *aff'd in part, rev'd in part, on other grounds Evans Products Co. v. ICC & USA*, 729 F.2d 1107 (7th Cir. 1984). Private car owners therefore had sufficient notice that the regulatory environment was in transition. *Box Cars, supra*, 367 I.C.C. at 760-61.

Nevertheless, even if contracts and leasing agreements now in effect were made in reliance upon *Indiana Harbor I*, the public was formally put on notice on October 10, 1984, that the *Indiana Harbor I* ruling might be modi-

fied or revoked, and indications that it might be changed were evident even earlier, after the Staggers Act was enacted in 1980. The car owners thus had ample opportunity to negotiate agreements providing for that contingency, and absent evidence to the contrary, we cannot assume that they did not. Moreover, it is possible that outstanding long-term contracts and leasing agreements that were, in fact, negotiated in reliance on *Indiana Harbor I*, can be renegotiated.[3] Thus, car owners will not be forced permanently, as RPI argues, to bear a cost they cannot recoup from the railroads.

RPI raises once again the issue of mileage allowance caps, arguing that caps prevent private car owners from obtaining complete recovery of repair move costs. We pointed out in *Indiana Harbor II* that the renegotiated tank car mileage allowance agreement contains provisions for dealing with caps and other nonconforming tariffs which provide a lesser allowance than that provided by the mileage allowance formula. These provisions require automatic investigation of such tariffs under the provisions of section 11122. *See Investigation of Tank Car Systems*, 3 I.C.C.2d 196 (1986), *petition for clarification denied* November 11, 1987. We also pointed out that we have investigated caps on allowances for covered hopper cars, and in appropriate cases, ordered them withdrawn. *See* No. 39908, *Mileage Allowances for Covered Hoppers, Grain Products, BN*, (not printed), served December 5, 1986. Again, we emphasize that section 11122 does not require that car compensation reflect a dollar for dollar return of each car owner's actual costs.

RPI further argues that the Commission erroneously concluded that the cost of repair moves is currently reflected in the data used in the computation of mileage allowances. RPI and Phillips Petroleum argue that the

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[3] Contracts often contain clauses to allow renegotiation or cancellation due to changes in law or regulation.

cost data are incomplete, because car owners have not yet incurred such costs.

It is true that car owners had not generally incurred those costs prior to the *Indiana Harbor II* decision. (We note at least two exceptions: The first exception involved charges imposed by carriers having only *de minimis* participation in loaded moves using private cars; they could impose such charges under *Indiana Harbor I*. The second involved IHB and BOCT's repair-move charges that were under investigation in No. 39380, which was decided concurrently with reopened No. 35404 in *Indiana Harbor II*).[4] Concededly, the cost of repair moves initiated by other carriers pursuant to *Indiana Harbor II* are thus not reflected in current mileage allowances. We did not claim otherwise. However, the renegotiated Ex Parte No. 328 agreement contains a specific provision for including repair movement costs,[5] and also provides that the cost and performance factors making up the mileage allowance schedule will be based on 12-month, rather than 3-year average expenses. Thus, such costs presumably will be fully incorporated at the time of the next annual update under the agreement.

Moreover, even if the initial allowance schedule does not fully reflect repair move costs, the overall level of such allowances are based upon many cost and non-cost factors, and we cannot say that (nor have petitioners shown that) car owners will not be adequately compensated, even during the first year.

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[4] Petitioners claim that repair move charges included in mileage allowance updates beginning in September 1984 were switching charges, rather than charges for entire empty repair shop movements. Because of the nature of IHB and BOCT's operations in the Chicago area, their repair move charges were shown as switching charges, but in substance they were charges to move cars to a repair facility.

[5] *See Investigations of Tank Car Systems*, 3 I.C.C.2d 196 (1986), last sentence in section 3(a) of the Appendix.

Finally, specific treatment of repair move costs in the negotiated agreement indicates the Joint Negotiating Committee's awareness of the possibility that the *Indiana Harbor I* rule would be overruled or modified. The Committee also could have provided for the inclusion of anticipated first-year repair move expenses, but did not. It may be that its failure to do so is simply one of the many compromises that were made to obtain a consensus. In any event, RPI was a party to the renegotiated agreement, and cannot now be heard to complain about its terms in the context of this proceeding.[6]

RPI also argues that, because changed mileage divisors are used, the structure of the mileage allowance system itself renders full reimbursement impossible. It gives four examples where reimbursement of repair move costs, for cars of varying values traveling the 5,170 loaded miles (the 1985 study fleet average), would be from 12.1 to 22.5 percent less than the repair move costs the railroads will not collect through tariffs. The AAR, using 7,000 miles of operation, but otherwise following RPI's example,

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[6] In support of its argument that the current mileage allowance does not include repair move costs, RPI also claims that the joint negotiating committee (JNC) specifically intended to defer the matter to future negotiations. There is no support for this proposition, either in the mileage allowance agreement or in the JNC's July 1, 1985 petition for prescription of a new mileage allowance system (joint petition). As noted, the agreement specifically deals with repair move costs. See footnote 4, *supra*. The only matters referred to by the JNC as subjects for future negotiations were the so-called "mileage equalization rule" and related provisions dealing with the handling of empty cars. These provisions, under which the railroads collect charges for empty mileage exceeding 106 (formerly 105) percent of loaded mileage, do not apply to repair moves covered by a tariff—mileage on empty cars moving on revenue billing is specifically excluded from equalization accounting—and thus have no bearing on the question of whether the mileage allowance adequately compensates car owners. (Those empty repair moves not moving on revenue billing would continue to be incuded in mileage equalization accounting).

shows that recovery can exceed repair move costs and that there is an incentive for greater car utilization. Thus, there is no reason to conclude that the private fleet as a whole would be undercompensated in a way that deviates from the plan of the renegotiated agreement. In any event, this argument, like RPI's other objections to the mileage allowance formula, assumes that the law requires precise cost-based reimbursement, an assumption we have previously rejected, and ignores the negotiated character of the renegotiated agreement, and RPI's participation in those negotiations. The mileage divisor changes were made during the Ex Parte No. 328 renegotiations in which RPI participated, and their express purpose was to account for the effects of supply and demand.[7] As noted above, RPI may not properly complain here about the formula it negotiated and we approved in that proceeding.

Finally, although RPI expressly limited its comments filed earlier in this proceeding to prospective application issues, it now also argues that our retroactive approval of IHB and BOCT's repair move charges is unauthorized by law, because recovery will not be complete.[8] Again, we disagree. The test for retroactive approval is fully discussed and correctly applied in *Indiana Harbor II*.

In summary, petitioners' overall contention that complete recovery of repair move costs is required is incorrect. The issue in this proceeding was whether separate charges may be assessed for movements to repair facilities. We found that, because of regulatory policy changes toward greater carrier ratemaking freedom and away from collective approaches that result in cross subsidization, the *Indiana Harbor I* prohibition against charging for repair moves should be overruled. In re-

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[7] This change in the mileage divisors is explained in detail in the JNC's joint petition at pages 13-16.

[8] Complainants in No. 39380 did not seek reopening of our *Indiana Harbor II* decision.

sponse to arguments that double charging would result, we noted that such repair move costs should be treated just like other repair expenses the private car owners initially pay. Nothing more is required in this proceeding.

We conclude that petitioners have failed to establish material error or any other grounds for reopening this proceeding. Accordingly, the petitions will be denied.

This action will not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. The petitions to reopen are denied.

2. This decision is effective on its service date.

By the Commission, Chairman Gradison, Vice Chairman Andre, Commissioners Sterrett, Simmons and Lamboley. Commissioner Lamboley concurred in the result.

NORETA R. MCGEE
Secretary

[SEAL]

APPENDIX G

[Service Date Nov. 28, 1983]

INTERSTATE COMMERCE COMMISSION

DECISION

No. 39380

GENERAL AMERICAN TRANSPORTATION CORPORATION, *et al.*

v.

BALTIMORE AND OHIO CHICAGO TERMINAL RAILROAD COMPANY, *et al.*

Decided: November 22, 1983

By William A. Shue, Administrative Law Judge:

This proceeding was directed for handling under the Commission's modified procedure. The verified testimonies and exhibits are received in evidence.

By complaint filed on or about June 10, 1983, General American Transportation Corporation (GATX), North American Car Corporation (North American) and Union Tank Car Company (UTLX) allege that the collection of charges by Baltimore and Ohio Chicago Terminal Railroad Company (B&OCT) and Indiana Harbor Belt Railroad Company (IHB) for the service of switching empty freight cars owned by GATX, North American and UTLX to and from facilities for cleaning, lining, relin-

ing, maintenance, modification or repair has constituted, and continues to constitute, an unreasonable practice related to transportation or service in violation of 49 U.S.C. § 10701(a), and an unreasonable car service practice in violation of 49 U.S.C. § 11121(a)(1). The complainant also alleges that IHB's failure to participate in the tank car mileage equalization rule of Mileage Tariff ICC PHJ 6007-Series violates the outstanding order of the Commission in Docket No. 36379, *Charges for Moving Empty Private Tank Cars on Own Wheels*, embraced within the decision in *General American Transp. Corp. v. Indiana Harbor*, 357 ICC 102 (1977). A cease and desist order and an award of reparation are sought.

Complainant's Position:

Complainants point out that all of the issues raised by the instant matter have been resolved in their favor in the Commission's comprehensive decision in *General American Transp. Corp. v. Indiana Harbor*, 357 ICC 102 (1977), *aff'd sub nom. Ind. Harbor Belt R. Co. v. General Am. Transp.*, 577 F.2d 394 (7th Cir., 1978). In that proceeding, the Commission reviewed and reconciled all of its previous major cases dealing with the subject of separate charges for the empty movement of privately-owned cars, and made the following unequivocal ultimate findings:

1. The service of switching empty privately-owned cars to and from facilities for repair, etc. is not a "distinct rail service" within the meaning of 49 U.S.C. § 10728(a) (then known as 49 U.S.C. § 15(18) for which a separate rate of charge is appropriate and lawful. 357 I.C.C., at p. 129;

2. Privately-owned cars moving empty to and from facilities for repair, etc. move as instrumentalities of transportation, rather than as articles of freight, if the rail carrier providing such empty transportation derives

more than a *de minimus* amount of revenue from the loaded movement of privately-owned cars of the type in question. 357 I.C.C., at p. 127;

3. The collection of a separate rate or charge for the empty movement of privately-owned cars to and from facilities for repair, etc. is unreasonably and unlawful if such cars are moving as instrumentalities of transportation. Rail carriers may recover the costs of providing such empty transportation only by participating in a mileage equalization rule of national application, or by factoring such costs into their rate level for providing loaded revenue transportation in privately-owned cars. 357 I.C.C., at pp. 127-128, 129-131, 135-138.

The above findings were affirmed in their entirety on judicial review. *Ind. Harbor Belt R. Co. v. General Am. Transp., supra, supra.*

Complainants go on to state that now barely five years subsequent in the instant case, two rail carriers have published separate charges for the empty movements of privately-owned cars to and from facilities for repair etc. of precisely the same nature as those that took place in the above-mentioned proceeding.

Complainants suggest that the reason for the rail carriers' action in publishing such a charge, and for the Commission's conduct in declining to suspend or investigate it, possibly can be found in a concurring opinion recently handed down by Commissioner Frederic N. Andre in Docket No. 38792, *Switching Charges for Privately-Owned Cars Billed to Repair Facilities*, decided October 12, 1982 (not printed). In that proceeding, the Commission distinguished *General American Transp. Corp. v. Indiana Harbor*, supra, in ruling that the collection of a separate charge by the Chicago Heights Terminal Transfer Railroad Company for the service of switching empty privately-owned cars to and from facilities for repair, etc. was reasonable. Commissioner Andre in his concur-

ring opinion stated that it was his view the decision in *Indiana Harbor* was "bad law and bad policy." *Switching Charges for Privately-Owned Cars Billed to Repair Facilities, supra.* Going on, the Commissioner asserted that ". . . . . (s)ound policy requires that railroads be as free as possible to break separate components of a service out of the general rate structure and finance them by separate and distinct charges. This can avoid the harmful results of cross-subsidization and rate averaging. . ."

It should be pointed out that the verified statements of Witness Polcm of GATX, Witness Alicz of North American, Witness Kieras of the UTLX, and Mr. Fauth, a transportation conslutant very familiar with private car costing and rate-making, which follow, establish that the facts which buttressed the Commission's decision in *General American Transp. Corp. v. Indiana Harbor, supra,* in 1977, are no less true and pertinent today in acertaining the reasonableness and lawfulness of the collection by IHB and B&OCT of separate charges for empty movements of private cars to and from repair shops.

Complainants contend that the Commission presented with analogous facts and law cannot legally depart from the determinations made in the cited case that switching empty private cars for repair is not a distinct rail service for which a separate rate or charge would be appropriate and lawful, and that the collection of such a separate charge for switching such cars when moving as instrumentalities of transportation is unreasonable and unlawful.

Defendants' Positions:

B&OCT in its reply to complainants' opening statement point out that what at issue in this proceeding is whether a railroad may collect a separate charge for a separate, distinct service the railroad furnishes and whether the

party that benefits from the service—the car owner—should pay for the carrier for the service it receives, or whether, under the rule of *Indiana Harbor*, the car owner is entitled to have the cost of the service borne by the serving railroads.

Defendant points out that in its verified statements and argument it has shown that the Commission has made considerable inroads into the rule of *Indiana Harbor* since that case was decided. In fact, one Commissioner has publicly condemned the rationale of the case and has called for its reversal. Furthermore, it asserts that the equalization rule and the "benefits rule" of *Indiana Harbor*, whereby carriers that utilize cars of the national fleet are considered compensated for the cars' empty movements to and from repair, have simply not worked. Defendant B&OCT points out that it is unable, without a separate charge, to cover the cost of empty movements. With the passage of the Staggers Rail Act of 1980, Congress has led rail carriers into a new era of competition and pricing freedom. B&OCT recommends that in light of this new emphasis upon innovative ratemaking unbundling of services and separate pricing, the Commission reviews the *Indiana Harbor* decision.

IHB in its opening statement of facts and argument submits that there have been two major developments which necessitate a new review on the part of the Commission concerning the question whether a carrier may assess switching charges on such empty repair moves, provided appropriate tariff items are filed. The charges are as follows: (1) The passage of the Staggers Act in October 1980, and (2) A change in the item giving authority for free empty repair moves in the Mileage Tariff since the previous decision (Item 125 of Maurer's Mileage Tariff 7-B, now Item 190-A of Mileage Tariff PHJ 6007-H) IHB hopes that it will be able to show that these two factors call for a revision of the Commission's position regarding the issue under consideration.

IHB asserts that it is entitled to establish a charge for empty repair moves whenever it is an independent move, not involving a loaded move on it immediately preceding or immediately following the repair move. Furthermore, it contends that Section 10728 of the Staggers Act provides for the establishment of separate rates for "distinct rail services." By limiting the application of its switch charge to independent repair moves not connected to a loaded move, respondent IHB is within the "distinct rail service" clause of this section. Thus IHB points out that its course of action is consonant with the decisions of Review Board No. 2 in *Inland Steel Company v. Illinois Central Gulf Railroad*, I.C.C. Docket No. 38646 (1982) wherein the Commission stated: "Finally, under 49 U.S.C. § 10728, a rail carrier may, on its own initiative, establish separate rates for distinct rail services. This section encourages those services to be priced in accord with cash-outlay incurred by the carrier and the demand for them. Moreover, the Staggers Rail Act of 1980 carries this policy forward. Accordingly, we find the 86/100 mile line-haul movements of the privately-owned coal cars involved to off-time repair facilities is a distinct service, not compensated for under the rate, and the proper subject of a separate charge."

In addition, Section 11121 of the Interstate Commerce Act was amended by the Stagegrs Act to provide with respect to car services, the Commission may compel a carrier to provide a facility or equipment only if the amount spent for the facilities, including return equal to the carriers current cost of capital, will be recovered. IHB indicates that it has established the cost of its switching facilities, including the cost of capital, to be approximately $72.00 per empty car each way. To this is added a small profit of $8.00 which is being dissipated by inflation. IHB points out that there is no way in which it can recover this amount through equalization and it cannot surcharge shippers' loaded moves with this

cost and still remain competitive. The car owner is recovering revenue on these private cars from three sources, namely lease rental from the shipper, mileage paid by user railroads under the Mileage Tariff and revenue for maintenance and repair of the cars. Furthermore, all incidental expenses, such as the switching charges, at issue in the instant matter, are passed on to the shipper/lessee as part of the repair expense under terms of the car lease. The commodity itself is very durable and has a long investment life associated with it. IHE poses the question what justification is there for permitting free empty repair moves under such conditions to the detriment of the railroads generating all the estimated revenue of $856,451.94 for the car owner?

Complainants' Reply:

Complainants in their reply statement conclude that the Commission should carry out without any change whatever its decision in the *Indiana Harbor* case. They point out that given the substantial identity of facts, parties and law in this proceeding and in the *IHB* matter, failure to arrive at the same result would lack a rational basis in law. As the United States Supreme Court recently perceived, deregulatory zeal cannot take the place of rational decision-making.

Discussion and Conclusions:

Prior to February 11, 1983, Paragraph 2A of Item 190-A (tank cars) and Paragraph 2A of Part B and Paragraph 20 of Part C of Item 615-B (other than tank cars) provided, in essence; that privately-owned cars, when released from load, will be moved empty without charge between stations or junction points and facilities for cleaning, lining, relining, maintenance, modification or repair.

Effective February 11, 1983, under independent action of Indiana Harbor Belt Railroad Company (IHB), Items

113-A (tank cars) and 397-A (other than tank cars) were published as exceptions to Items 190-A and 615-B, respectively, and they provided that the movement of empty cars without charge to or from facilities for cleaning, lining, relining, maintenance, modification or repair will not apply to such cars moving to or from facilities served by the IHB unless the empty movement is immediately preceded by or followed by a loaded revenue movement via IHB. In all other circumstances, the charges published in Tariff ICC IHB 8325-series for movement of empty cars on their own wheels to and from repair facilities shall apply. The published charge in Item 210 of ICC IHB 8325-D for the described empty car movement is $80.00 per car in each direction.

Effective March 23, 1983, independent action of the same import was taken by Baltimore and Ohio Chicago Terminal Railroad Company (BOCT) with the publication of Items 62 (tank cars) and 274 (other than tank cars) as exceptions to Items 190-A and 615-B, respectively. However, the per car charges published by BOCT in its ICC BOCT 8000-C and ICC BOCT 8001-C for the described empty car movements, in each direction, are $95.00 in the Chicago, IL, area, and $124.00 at Chicago Heights and Glenwood, IL.

The IHB adjustment was protested by Evans Products Co., North American Car Corp. (NACC), General American Car Corp. (GACC), and Union Tank Car Co. (Union), and considered by the Suspension Board in Case No. 70993. The Suspension Board voted unanimously not to suspend, and Appellate Division 1 denied appeals for reconsideration.

The BOCT adjustment was protested by NACC, GACC and Union, and considered by the Suspension Board in Case No. 71025. The Suspension Board again voted unanimously not to suspend, and Appellate Division 1 denied appeals for reconsideration.

In the above-identified Suspension Board cases, protestants generally alleged that the adjustments violated an outstanding order of the Commission in Ex Parte No. 328, *Investigation of Tank Car Allowance System*, served June 15, 1979 (not printed), and that they contravene the Commission's decision in *General American Transp. Corp.* v. *Indiana Harbor*, 357 I.C.C. 102, which was affirmed on judicial review in *Indiana Harbor Belt R. Co.* v. *General American Transp.*, 577 F. 2d 394, Seventh Circuit. Essentially, the same allegations are made in the petitions in the proceeding at hand.

It should be noted that in the agreement governing tank car mileage allowance as set forth by the parties in Ex Parte No. 328 the tank car mileage equalization ratio called for 106 percent for the calendar year 1979. With respect to the equalization ratio and rules for 1980 and subsequent years the agreement provided that the tank car mileage equalization ratio for 1979 would remain in effect thereafter until material changes in the conditions and practices of tank car movements revealed the need for a new movement study and that appropriate changes in the ratio and rules would then be made to comport with its results.

In a very recent case handed down by the Commission with a service date of November 4, 1983, Ex Parte No. 328, *Investigation of Tank Car Allowance System*, decided October 31, 1983 in which a joint petition was filed by members of the Joint Negotiating Committee (JNC)[1] that requested modification on an interim basis until September 1, 1985, of the formula for computing tank car allowances, the Commission proposed to adopt the following modifications to the 1979 agreement found in Ex

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[1] Association of American Railroads (AAR), American Petroleum Institute, Chemical Manufacturer Association, Corn Refiner Association, Institute of Shortening and Edible Oils, Inc., International Minerals and Chemicals, Railway Progress, Institute, WFIK Partners, and Westway Trading Corporation.

Parte No. 328, *Investigation Of Tank Car Allowance System*, served June 15, 1979:

(1) The interest component in the formula [Section 2(b) of the 1979 decision] will be frozen at the present level of 11.73 percent.

(2) Study fleet maintenance and operating costs [Section 3(a)] shall be calculated and updated annually for groups of tank cars on the basis of age, cars will be divided into six five-year age brackets, and all cars over thirty years of age will be placed in a seventh bracket (collectively, "five-year age groups").

(3) The updated Tank Car Loaded Mileage ("car mile divisor") and Transportation Use Ratio (Section 4) now in use, based on "study fleet" and freight car movement data for the period from 1979 through 1981, will be recomputed for five-year age groups of tank cars and will be frozen until September 1, 1985.

(4) In determining maintenance and operating costs, Tank Car Loaded Mileage, and Transportation Use Ratios, cars that accrued no loaded mileage during any study year would be excluded from compilations of data for that year; and mileage and operating and maintenance costs for all new cars in service less than one year would be annualized to reflect full year operation.

(5) The Maximum Value Bracket [Section 2(d)(3)] on which compensation would be paid for all cars built prior to 1983 would be $64,001-$65,000; for cars built thereafter, the Maximum Value Bracket would be determined as provided in the 1979 agreement, but once a Maximum Value Bracket is finally determined and assigned to cars built in a particular year, it would not be modified in later years.

(6) The interim modifications are not a precedent for, and shall not be used as evidence for any purpose in any

proceeding concerning the amount of structure of national mileage allowances.

The Commission pointed out that the above modifications did not appear to violate any statutory provision or Commission policies, and that they would facilitate the negotiation of a revised tank car allowance agreement. The request is supported by railroads and tank car suppliers.

In *Indiana Harbor*, the Commission ruled that the service of switching empty-owned freight cars to and from repair facilities is not a "distinct rail service" under 49 U.S.C. § 10728(a) for which a separate charge may be collected. The Commission's rationale was that ordinary repairs are an essential part of the movement of freight and not a distinct service in themselves, thus, switching for such repairs could not be deemed a distinct rail service. 357 I.C.C. at 129. In the instant case complainants contend that the Commission cannot legally depart from its determination that switching empty cars for repairs is not a distinct rail service. In addition, they assert that neither the facts nor the law central to that conclusion have changed since the *Indiana Harbor* case was issued in 1977 in a fashion which would call for a different result here. This Administrative Law Judge believes that both of these contentions are not correct. First of all, there is no rule of law that binds an agency to its previous decisions. In other words, an agency is not precluded from re-examining questions previously decided by it in earlier decisions, nor is it foreclosed thereby from reaching different determinations. In *United States v. American Sheet & Tin Plate Co.*, 301 U.S. 402, the Supreme Court stated: "The Commission, so it is said, has approved allowances in instances such as those under review and by a long course of decision has sanctioned the practice; and the claim is that carriers have relied upon the Commission's action in doing plant spotting or making allowance for the performance of that service by

industries. We cannot agree either that the Commission has so decided or that if it had it would be precluded from re-examining the question in the light of existing conditions. . . . But whatever may have been decided in the past, it is evidence that the growth of the practice of making allowances for plant switching and the lack of uniformity in the practice of the carriers with respect to this service properly called for an investigation of the entire situation and the promulgation of appropriate orders to regulate the practice and prevent performance of a service not within the carriers' transportation obligation. The investigation and the consequent orders of the Commission were not foreclosed by its earlier decisions."

However, in the event of a reversal, it is, to be sure, incumbent upon the Commission to furnish an opinion or analysis revealing that the standard is being changed and not overlooked, thus assuring that it is consistent and not unconcerned about the rule of law. *Columbia Broadcasting System, Inc.* v. *F.C.C.*, 454 F2d 1018, 1026.

Times have changed since the *Indiana Harbor* case. We see extensive legislation enacted subsequent to that proceeding. The Staggers Act essentially permits rail carriers to exact whatever they wish for rail services. Furthermore, the 4-R Act encouraged separate pricing for distinct rail services. To be sure, the Commission has stated that this does not refer to the supply of cars. However, the crux of the issue in the instant case is whether legislation enacted subsequent to the above-mentioned cases has sufficiently changed the law such that those precedents are no longer valid.

In Docket No. 38792, *Switching Charges For Privately-Owned Cars Billed to Repair Facilities*, served October 18, 1982, Commissioner Frederic N. Andre observed: ". . . . . *Indiana Harbor* was bad law and bad policy and should ultimately be overturned. . . . . [A]lthough the Commission's decision in *Indiana Harbor* was affirmed on

appeal, the court's decision does not seem to tie the Commission's hands in the future". The Administrative Law Judge agrees with Commissioner Andre that the court's decision does not preclude the Commission from re-examining its previous ruling and deems now to be an appropriate time to do so.

Environmental matters are not at issue.

Contentions of the complainants as to fact or law not specifically discussed hereinabove have been given due consideration and are found to be either not materially significant or not justified.

It is found and concluded that the complainants have not sustained their burden of proof, and that the service of switching empty private cars to and from facilities for repair is a "distinct rail service" within the meaning of 49 U.S.C. § 10728(a) for which a separate charge may be lawfully collected; and that the collection of a separate charge by the defendants for the service of moving empty cars to and from repair facilities is a reasonable practice under 49 U.S. §§ 10701(a) and 1121(a). The complaint is ordered dismissed and complainants' petition for reparation is denied. The proceeding is ordered discontinued.

By the Commission,

/s/ William A. Shue
WILLIAM A. SHUE
Administrative Law Judge

[SEAL]

JAMES H. BAYNE
Acting Secretary

APPENDIX H

INTERSTATE COMMERCE COMMISSION DECISION

No. 39380

GENERAL AMERICAN TRANSPORTATION CORPORATION, *et al.*
v.
BALTIMORE AND OHIO CHICAGO TERMINAL RAILROAD COMPANY, *et al.*

Decided: June 1, 1984

General American Transportation Corporation (GATC), Union Tank Car Company (UTCC), and North American Car Corporation (NACC), complainants, have appealed from the initial decision of the Administrative Law Judge dismissing their complaint for reparations and other relief. Defendants Baltimore and Ohio Chicago Terminal Railroad Company (BOCT) and Indiana Harbor Belt Railroad Company (IHB) replied. Because our conclusions differ from those of the Administrative Law Judge, the appeals will be granted.

BACKGROUND

Rail carriers making use of privately-owned cars to meet their common carrier obligations compensate the car owners on a loaded mileage basis. The mileage tariff contains an equalization rule which compensates carriers for excess empty mileage transporting private tank cars.

IHB and BOCT are intermediate switching carriers operating in the Chicago, IL, switching district. Essentially their operations consist of switching loaded and empty cars between various line haul carriers, and to and from their on-line industries and privately-owned on-line car repair facilities.

Both BOCT and IHB participated in Items 190-Series and 615-Series of Mileage Tariff ICC PHJ-6007H providing for empty movement of privately-owned cars without charge to and from privately-owned facilities for repairs.[1] Effective February 11, 1983, both carriers filed tariff supplements excluding themselves from items 190 and 615 unless the empty movement immediately preceded or followed a loaded revenue movement in which they participated. Each established switching charges for the excluded movements, and IHB excluded itself from the tank car equalization rule of the mileage tariff.

Between 1978 and 1982, IHB made 116,610 empty moves to or from repair facilities. It recovered $96,263[2] from operation of the equalization rule. It alleges that a compensatory recovery would have been $856,452. BOCT kept no records of free repair moves before filing its tariff, but estimates that on average 33 cars a day moved free.

Complainants unsuccessfully protested the tariff adjustments and then filed the instant complaint, alleging that the collection of charges by BOCT and IHB for switching empty cars to and from facilities for repair and other services is an unreasonable practice in violation of 49 U.S.C. 10701(a) and 11121(a)(1). It is undisputed that defendants derive substantial economic benefit from

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[1] Also cleaning, lining, relining, maintenance, and modification.

[2] The figure includes an estimate for 1982.

the movement of private cars over their lines.[3] Accordingly, complainants argue, empty cars moving for routine repair move not as freight but as instrumentalities of transportation and, since the service provided is not a "distinct rail service," the collection of a separate rate or charge is unreasonable and unlawful. Finally, complainants allege that IHB's excluding itself from the tank car equalization rule violates an outstanding order of the Commission. Complainants seek a cease and desist order and reparations.

The Administrative Law Judge concluded (1) that complainants had not sustained their burden of proof, (2) that the service of switching empty private cars to and from facilities for repair is a distinct rail service for which a separate charge may be lawfully collected, and (3) that the collection of the separate charge by defendants is a reasonable practice.

On appeal, complainants argue that these three conclusions are in error, and that the Administrative Law Judge further erred in failing to find that IHB is in violation of an outstanding order of the Commission.

DISCUSSION AND CONCLUSIONS

In *General American Transp. Corp.* v. *Indiana Harbor*, 357 I.C.C. 102 (1977), *aff'd sub nom. Ind. Harbor Belt R. Co.* v. *General Am. Transp.*, 577 F.2d 394 (7th Cir., 1978) (*Indiana Harbor*), the Commission reviewed and reconciled all of its major cases concerned with the imposition of separate charges for the empty movement of privately-owned cars. It concluded that, as a matter of

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[3] Complainants, in their opening verified statements, showed the following total revenue miles during 1980, 1981, and 1982:

		BOCT	IHB
Cars owned by	GATC	670,645	280,969
" " "	NACC	207,004	203,363
" " "	UTCC	316,615	199,686

law, the switching of empty privately-owned cars for repair is not a distinct rail service because loaded movement would be impossible without the performance of ordinary repairs, and repair movements are therefore "necessary to the movement of freight."[4] 357 I.C.C. at 129. No exception was recognized.

Consistent with *Indiana Harbor*, a carrier may assess a charge for switching empty private cars for repairs only where these cars move as property and not as instrumentalities of transportation. *Id.* at 123. The determination of whether a car is moving as an instrumentality of transportation or private property depends upon whether there is an economic benefit to the transporting carrier. *Ibid.* An economic benefit may be either direct or indirect. A direct benefit may result from immediately prior or subsequent revenue line-haul or switching movement. Indirect benefit results when the carrier makes more than a *de minimis* use of private cars to fulfill its common carrier obligations. *Id.* at 126-127.

A carrier that benefits from use of the national car fleet may not impose a charge for repair moves. Rather, it must derive its compensation for repair movements from (1) an equalization rule of national application, and (2) a cost element factored into its freight rates on loaded movements. To prove unlawful a carrier charge for the empty movement of privately-owned cars for repair, the burden is on a complainant to show both (1) that the rail carrier providing the service derives more than *de minimis* revenue from the loaded movement of private cars

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[4] In Ex Parte No. 331, *Expeditious Procedures for Permitting Publication of Separate Rates for Distinct Rail Services*, 355 I.C.C. 684 (1977), the Commission defined distinct rail services as "those railroad transportation services, which are separate from line-haul transportation services necessary for the movement of freight, and for which a specific tariff item is published by the railroads either upon their own initiative or upon the request of any shipper or receiver of freight." Id. at 696.

over its line[5] (benefits or instrumentalities of transportation test), and (2) that the repairs in question are necessary to the rail car movement of freight (distinct rail service test).

Defendants may demonstrate the lawfulness of their charges by showing an absence of economic benefit or that the service provided is in fact a distinct rail service. In No. 36116, *Charges for Movement of Empty Cars, East Camden and Highland Railroad Company* (EC&H), embraced within *Indiana Harbor*, the Commission recognized that where a carrier derives no revenue from loaded movements of privately-owned cars, empty repair mileage will not be compensated by freight rates. 375 I.C.C. at 131. The EC&H was permitted to publish charges for empty repair switches as an alternative to participating in a nationwide equalization rule.

In No. 38646, *Inland Steel Company* v. *Illinois Central Gulf Railroad Company* (not printed), served May 24, 1982, the indirect benefit test of *Indiana Harbor* was defeated by a showing that privately-owned cars dedicated to unit train service were not part of the national car fleet and that the negotiated tariff under which they moved in revenue service superseded the mileage allowance and required less from the carrier than its usual common carrier obligation. The decision suggested but did not find that round-trip movements of 86 and 100 miles to facilities off the route of line-haul movement could be considered a distinct rail service. Similarly, in No. 38792, *Switching Charge for Privately-Owned Cars Billed to Repair Facilities* (not printed), served October 18, 1982, *aff'd in part sub nom.* No. 82-3017, *Evans Products Co. et al.* v. *I.C.C. et al.*, —— F.2d —— (7th Cir. 1984), a terminal switching carrier not participating in the mileage tariff was found not to receive sufficient in-

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[5] As an alternative, complainants may show a direct benefit from immediately prior or subsequent revenue movement.

direct benefit from the movement of private cars to warrant considering empty cars as instrumentalities of transportation when being switched by it to repair shops.

Complainants have met the burden of proof established in *Indiana Harbor*. They have shown that defendants' use of privately-owned cars in revenue service (fn. 3, *supra*) was sufficient to meet the indirect benefit test. *Indiana Harbor* establishes a presumption that switching of empty private cars for repairs is not a distinct rail service. Complainants met the second part of their burden by relying on the presumption.

Notwithstanding the substantial revenues they receive from the movement of loaded private cars, defendants contend that they receive no indirect benefit because (1) they pay a mileage alowance to the car owners for the loaded movement, (2) the payments they receive under the equalization rule are not compensatory, and (3) as switching carriers, they do not participate in line haul revenues but are limited (except in the case of cross-town tariff switches) to a switching allowance which is absorbed by the line haul carriers. The allowance assertedly does not include the cost of empty repair switches, and the switching carriers cannot add this cost to the allowance.

We note initially that defendants' arguments regarding the benefit test are not properly before us since the Administrative Law Judge pretermitted the issue and complainants did not raise the omission in their appeal. We note in any event that IHB raised the switching allowance issue in *Indiana Harbor*, *supra*, at 114 and that defendants' arguments do not address the principal rationale for the benefit test: that the benefit arises out of the use of private cars to fulfill the common carrier obligation.

Defendants, in an attempt to bolster the Administrative Law Judge's finding of distinct rail service, advocate two

additional theories. Acknowledging that there has been no change in 49 U.S.C. 10728 since *Indiana Harbor*, they nonetheless point out that section 10701a, added by the Staggers Rail Act of 1980, permits rail carriers to establish for the transportation or service they provide, any rate that is not otherwise prohibited by Title 49, and establishes standards for minimum rate reasonableness. They argue that the free, empty movements for repair violate section 10701a and section 11121(a) relating to adequate compensation for car service. Defendants are mistaken. The cited statutory provisions apply only to transportation, as defined in 49 U.S.C. 10102(24), or to distinct rail services. The empty repair movements at issue here are neither.

Furthermore, section 10701a relates to the reasonableness of rates, not of practices. Commission actions under *Indiana Harbor* do not purport to limit the level of the rates defendants may charge. Rather, they look at the reasonableness of the practice of imposing a separate charge, regardless of the effect on rate levels. Thus, a finding that a charge for the movement of empty cars for repair violates 49 U.S.C. 10701 or 11121a is not contrary to the limitation of 49 U.S.C. 10707a(h). *See* H.R. Rep. No. 96-1430, 96th Cong., 2nd Sess. 96 (1980).

Finally, defendants argue that, unlike the charges disallowed in *Indiana Harbor*, their present tariffs distinguish between independent switch moves for repair and those integrated with a revenue movement. Assertedly, integrated repair moves are not a distinct rail service because they are made during a return or initial empty move of the car and are therefore arguably part of the line haul transportation service. Independent moves, on the other hand assertedly are a distinct rail service since they do not relate to a revenue movement. The distinction, they assert, was not considered by the Commission in *Indiana Harbor*. We disagree.

IHB argued for the same rule in *Indiana Harbor*. 357 I.C.C. at 113-114. The argument is no stronger now than it was then, because defendants still misapprehend the reason for the Commission's finding that empty repair switches are not distinct rail services. Starting with the definition of distinct rail service in Ex Parte No. 331 (fn. 4, *supra*), the Commission found that "[s]ince repair movements are necessary to the movement of freight in all revenue service, switching for repairs cannot be considered a distinct rail service whether performed by a line haul or switching carrier." 357 I.C.C. at 129. A showing that the switch is separate from the line haul is not enough. The purported distinction between independent and integrated moves does not address the "necessary to the movement of freight" part of the test. Defendants' other arguments regarding the historical view of switching and comparing it to such distinct services as weighing, storage, loading, and unloading likewise miss the mark because such views are limited to revenue service. Finally, no extraordinary circumstances comparable to those present in *Inland Steel* are found here.

We conclude that this case is governed by the Commission's decision in *Indiana Harbor*. We also note that in *Indiana Harbor*, IHB was ordered to participate in the tank car equalization rule. 357 I.C.C. at 130. IHB's tariff action cancelling its participation in the equalization rule violates this outstanding order of the Commission, since tariff relief has neither been sought nor granted.

We find:

The collection of charges by defendants for switching of empty privately-owned cars to facilities for cleaning, lining, relining, maintenance, modification or repairs, except to the extent otherwise authorized by the Commission, is an unreasonable practice in violation of 49 U.S.C. 10701(a) and 11121(a)(1).

This decision will not affect the quality of the human environment or energy conservation.

It is ordered:

1. Defendants Indiana Harbor Belt Railway Company and Baltimore and Ohio Chicago Terminal Railroad Company shall cancel the assailed tariff schedules on or before 30 days from the service date of this decision, upon not less than 1 days' notice to the Commission and the public by filing and posting in the manner prescribed by the Interstate Commerce Act.

2. Indiana Harbor Belt Railway Company is required to participate in the equalization rule set forth in Item 187 of Mileage Tariff ICC PHJ 6007H.

3. Ascertainment of damages to complainants shall await filing of a statement showing details of such damages pursuant to 49 C.F.R. 1133.2.

4. This decision is effective on the date of service.

By the Commission, the Review Board, Members Carleton, Fortier, and Dowell.

[SEAL]

JAMES H. BAYNE
Secretary

APPENDIX I

SUPREME COURT OF THE UNITED STATES

No. A-206

GENERAL AMERICAN TRANSPORTATION CORPORATION, *et al.*,
Petitioners

v.

INTERSTATE COMMERCE COMMISSION
and UNITED STATES

ORDER

UPON CONSIDERATION of the application of counsel for the petitioners,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including October 28, 1989.

/s/ William H. Rehnquist
Chief Justice of the United States

Dated this 13th day of September, 1989.